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4 record.

5 **IN THE COMPETITION**  
6 **APPEAL**  
7 **TRIBUNAL**  
8

Case No: 1639/7/7/24

9  
10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP

13 Thursday 18<sup>th</sup> December 2025

14  
15 Before:

16  
17 Hodge Malek KC  
18 Timothy Sawyer  
19 Andrew Taylor

20  
21 (Sitting as a Tribunal in England and Wales)

22  
23  
24 BETWEEN:

25  
26 **Bulk Mail Claim Limited**

27  
28 **Class Representative**

29  
30  
31 And

32  
33 **International Distribution Services Plc (formerly Royal  
34 Mail Plc)**

35  
36 **Defendant**

37  
38 **A P P E A R A N C E S**

39  
40 Paul Harris KC, Ben Rayment and Hannah Bernstein on behalf of Bulk Mail Claim Limited  
41 (Instructed by Lewis Silkin LLP)

42  
43 Kenneth MacLean KC, Edmund Nourse KC and Andrew McIntyre on behalf of International  
44 Distribution Services Plc (formerly Royal Mail Plc) (Instructed by Hogan Lovells  
45 International LLP)

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(10.30 am)

Housekeeping

THE CHAIRMAN: Some of you are joining us live stream on our website, so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

As I said, there would be an authorised transcript which will be available on the website and there's probably going to be a written ruling arising after today that will also be publicly available.

Mr Harris.

MR HARRIS: Sir, there is an agenda for today which may be a convenient way to proceed; I'm in your hands. I do have a slight housekeeping update, if it's of assistance.

THE CHAIRMAN: Well, let's hear that at first. Yes, okay.

MR HARRIS: If I could hand in four copies, one for the Referendaire, and one for -- it's just there are now two additional tabs of very short correspondence last night and this morning for the back of file 2 of bundle B.

THE CHAIRMAN: Bundle B, yes?

MR HARRIS: Bundle B, right at the back, you should now be able to add in a new tab, 92, and a new tab, 93.

THE CHAIRMAN: Okay, let's just make sure.

I've read all the correspondence yesterday. Some of it was very helpful. I can't say the same about all of it, though, I'm afraid to say. The solicitors like to write letters to each other, but at the end of the day, I'd much rather hear from you and MacLean as

1 to explaining the points.

2 MR HARRIS: Sir, well, I hope we can --

3 THE CHAIRMAN: Yes, that's good. So I'll put that then -- I'll put the index in.

4 MR HARRIS: All I know is the letter about customer group. That's lower down the  
5 agenda. The other one is about the query on intermediaries which is, again, lower  
6 down the agenda.

7 THE CHAIRMAN: Yes, we need to resolve those insofar as we can today.

8 MR HARRIS: Yes. I'm entirely in your hands, sir. As I say, on page 5 -- I think, sir,  
9 that was probably bundle B1, tab 1.

10 THE CHAIRMAN: Yes.

11 MR HARRIS: I've taken it out, but it's page 5 and there is the agenda that at least  
12 enumerates the topics that we're probably going to cover today.

13 THE CHAIRMAN: Yes, there's a -- I've obviously got other things that I want to add.  
14 So, for example, when it gets to trial we may want to have a list of issues, a list of  
15 contested facts, that the parties want the tribunal to resolve. Another thing is that we,  
16 depending on how it works, is that we may want a statement of agreed facts, and we'd  
17 definitely want a chronology. I think you know me well enough. I like the chronology  
18 in two parts: one is a chronology of events by reference to the documents in the trial  
19 bundle; and then the other half is the chronology of the proceedings.

20 So if, let's say, a defence has been filed, give me the date and the page reference,  
21 and I can find it very quickly. Ideally, if the chronologies can be hyperlinked, then it's  
22 much easier because. I can sit back and then go through the chronology and look at  
23 the relevant document that the parties are going to rely on.

24 But that's probably enough I need to say about that. Let's go onto the -- whichever  
25 way you want to deal with it. But there's a number of issues on expert evidence, and  
26 I think what I'd like to probably hear first is about this trade evidence, okay? Because

1 I've seen what you said and I've seen what MacLean has said. It's a lot more  
2 complicated topic than at first sight as to whether or not trade evidence is admissible  
3 at all, and if it is admissible, whether you admit it as evidence of fact or you admit it as  
4 expert evidence.

5 I know MacLean cited a couple of cases on it. There's more cases than that on it.  
6 I think that we will have to get to grips with it, but I don't feel, unless you can persuade  
7 me, that I've got enough understanding of who this expert is because, as you know,  
8 I don't like ordering expert evidence until I know who the expert is and what the issues  
9 are going to cover.

10 So the first is I'd need to know who it is, exactly what they're going to do, how that  
11 relates to the issues in the proceedings and how it is admissible, bearing in mind the  
12 relevant authorities. You know, admissibility of trade evidence is a lot more  
13 complicated than it appears at first sight; there are cases, there are inconsistent cases.  
14 But Malek's approach is that I don't like leaving things to trial and say, "I'll let it in  
15 de bene esse". If there's an issue about admissibility, I'd want you and MacLean to  
16 take me through it and we resolve that before the trial.

17 Probably, leaving it to the PTR is too late. But you don't want to fall between two  
18 stools; you don't want the defendant later on to say, "Ah, this is a very late application",  
19 and that you've -- I think you've dealt with that by flagging it up as an issue now. So if  
20 we're able to come to a landing on this next year, I think that's probably the best way  
21 to deal with the trade evidence. You'll understand what I'm looking for, but I don't think  
22 we're going to get to the bottom of it today. Unless I'm wrong; unless you want me to  
23 get to the bottom of it.

24

25 Trade evidence

26 Submissions by MR HARRIS

1 MR HARRIS: I'm very relaxed about that. Let me just pithily, I hope, explain what's  
2 going on.

3 THE CHAIRMAN: Yes.

4 MR HARRIS: The reason that we wrote the letter to say we will be subject to any  
5 objections by the tribunal relying upon a trade witness is because the direction on the  
6 last occasion was for us to identify to the tribunal if there was going to be any possibility  
7 of an application for other expert evidence.

8 THE CHAIRMAN: You've done that, and I'm happy that you've done your job on that,  
9 yes.

10 MR HARRIS: It is possible that had there not been that direction on the September  
11 CMC, we wouldn't have written the letter identifying that we wished to rely upon a trade  
12 witness until a few more months down the line into next year.

13 THE CHAIRMAN: Yes.

14 MR HARRIS: In that sense, I am relaxed on behalf of the CR if, formally, the issue is  
15 not decided one way or the other today. I don't mind if it's adjourned until the  
16 appropriate point next year. But it was right for us, as you've identified and  
17 I respectfully agree, to explain to the tribunal the position in which we find ourselves.  
18 So that's what I'm going to turn to next, again, very briefly and in outline, because it  
19 seems to me there are therefore two options, so I'll come back to that. Two options:  
20 one could either adjourn formally for a decision on whether to grant experts permission  
21 until an appropriate point next year; or one could do what's been done in a couple of  
22 the other collective cases recently -- for instance, Coll and Kent, and I'll happily take  
23 you to them if you like -- where all of the difficulties or issues that face this class  
24 representative, namely Bulk Mail Claim Limited, have faced Dr Rachael Kent and in  
25 the Coll case.

26 What the tribunal has done on each of those occasions is say, "Well, look, I'll give you,

1 | if you like, conditional permission or permission for now, because I recognise that  
2 | some of the evidence that you end up adducing from the trade witness will be not  
3 | expert evidence, and prima facie, you have therefore a right to put that in -- you don't  
4 | need permission for that which isn't expert evidence -- but some of it may cross that  
5 | line into being expert evidence, and there you do need permission and I'm going to  
6 | defer that formal determination of what's expert and what's not and therefore whether  
7 | you need permission and it's admissible or not until a later point".

8 | THE CHAIRMAN: But you've missed out one limb, okay? So you say that if I decide  
9 | it as expert evidence, I've got power to decide whether or not to give you permission.  
10 | But you're also saying, "Well, if it's factual evidence, I've got a right to submit it", which  
11 | I'm sure if MacLean had the opportunity to say it, MacLean says, "Well, there's  
12 | a premise there that doesn't actually apply, because is it even admissible as factual  
13 | evidence?".

14 | So you've got to cover both limbs, which is: is it admissible -- I don't want you to do it  
15 | today because you need to look at it properly, but you need to decide: is it admissible  
16 | at all, and if it's admissible at all, is it factual or expert evidence? I think on the facts  
17 | of the present case, I'm not going to allow you to say, "I'm going to file this as factual  
18 | evidence so you've got no power to control it because it's factual evidence". That's  
19 | not what's going to happen. If, obviously, other chairmen have taken a different view  
20 | and given conditional permission, that's fine, but they're not trying this case. You've  
21 | got me, unfortunately for you. You know what I'm like; you've been performing for the  
22 | last -- I don't know how many years. You know, I always like to get it sorted out as  
23 | a matter of law prior to trial and not just leave it in the air.

24 | So what I want to do on this trade evidence is that you go back, you identify what  
25 | issues you want them to deal with, explain who the trade expert or the trade witness  
26 | is going to be, put the issues by reference to the pleadings, and then when you're

1 ready, you take out an application. You're not going to be punished by me or this  
2 tribunal for a late application if you do this in advance of the date for the exchange of  
3 factual witness statements, and so we'll come to that later.

4 But once we know what that date is, we'll have a reference time as to when you can  
5 make your application. But it's only fair to McLean's side that they know, before they  
6 have to serve their factual evidence, where they are. But I understand in cases like  
7 yours, there's always a disadvantage, because what will happen is that MacLean will  
8 have people working for Royal Mail who know the industry backwards, and they will  
9 be saying -- they're going to be giving evidence as to how their practices are and how  
10 it works in practice, and that you will want to be able to respond to that.

11 That's why people in your position, you tend to try and get trade witness, whereas they  
12 probably don't need to do that; they will have people in-house who can give evidence  
13 on that.

14 We're not going to get to a landing to it, and you may end up having to do more than  
15 one shot with this person. Because what you may find is, let's say you get permission  
16 to have your trade witness and I say it's a factual witness, you exchange your witness  
17 statements, then you see MacLean's done all this sort of stuff with his witnesses about  
18 how practices worked, and then you'll say, "Well, we haven't really addressed all of  
19 that". Then you may have to then come back and then say, "Well, look, I'm going to  
20 put a further witness statement from this person to cover all of that".

21 MR HARRIS: Sir, I'm very (overspeaking).

22 THE CHAIRMAN: But you can see how I'm looking at this.

23 MR HARRIS: Absolutely.

24 THE CHAIRMAN: I don't want either side to be surprised or prejudiced by this. But  
25 I do recognise that when you're a claimant against an entity like Royal Mail, there's an  
26 inherent disadvantage for you when it comes to this particular area, because they're

1 saying, "Well, I've been doing this for donkey's years and this is how it works", and  
2 then what ammunition do you have?

3 MR HARRIS: Well, may I make some practical suggestions --

4 THE CHAIRMAN: Yes.

5 MR HARRIS: -- because I'm entirely relaxed. We don't need a formal decision today,  
6 whether you call it adjourned or we're just going to relist or it arises later. But the  
7 practical suggestion is this, that whilst we will probably be able to identify the individual  
8 early next year, it may be that simply identifying the individual to you with the person's  
9 CV and whatever practical arrangements there may be is not as of much use as would  
10 be waiting much further into next year, by which time disclosure is much further  
11 advanced. Because when disclosure is much further advanced, we're much more  
12 likely to be able to refine at least the topics that the named individual with the CV is  
13 going to cover.

14 Let's say, just for the sake of argument -- because we're going to have an argument  
15 later about where the dates will fall on disclosure -- disclosure is substantially done by,  
16 say, June next year. Then there's a gap, then, between disclosure and factual witness  
17 evidence. It could be shortly after disclosure is complete that we then come to you  
18 with a more formulated application, and we say it will be this person with this CV under  
19 these arrangements, and here is a -- you know, not a definitive but nevertheless  
20 a pretty well-identified list of topics that we propose that that person is going to cover.  
21 No doubt some of them will be trade industry fact evidence, properly so-called, so far  
22 as one can tell, but there must be a clear chance that some of them are going to at  
23 least potentially be expert evidence within the meaning of the rules. At that point, you  
24 can express a view as to whether that looks like a sensible way forward.

25 The second practical point is this: because we recognise that there might be some of  
26 the evidence -- unless there's an objection by the tribunal -- that will be fact evidence

1 or, if you like, trade industry practice evidence, but not strictly expert -- but in addition,  
2 there may be expert evidence. We would propose, so as to alleviate any disadvantage  
3 on the part of Royal Mail to put any evidence from that person in at the date of the  
4 factual witness statements, not to defer however much until months later for expert  
5 evidence.

6 That has two advantages. First of all, it means that you, the tribunal, would be in  
7 a position to look earlier rather than later at the entire scope of the evidence, and if  
8 there's an actual argument about, say, paragraphs 23, 40, whether they're fact or  
9 expert and whether they're admissible under the expert test or not, we can have that  
10 out. We can have that out sooner rather than later, and certainly well before my  
11 learned friends have to respond by way of any expert evidence.

12 That's the second practical point. If we put this forward at the same date as factual  
13 evidence rather than expert, any issues can be resolved in a manner that then leaves  
14 Royal Mail able to deal with it. They can either deal with it, if they see fit, by way of  
15 fact evidence, or they can deal with it by way of expert evidence, or a mixture. They  
16 will have had the benefit of the views of the tribunal as to what categories that evidence  
17 falls into.

18 Those are my suggestions: that we defer any formal decision from today until the  
19 appropriate date next year. Probably at least at the back end of the disclosure  
20 process, if not shortly after it's finished; we come to you with an application, and then  
21 we put it all in on the date of fact evidence.

22 THE CHAIRMAN: Okay. Let's see what MacLean says.

23 Submissions by MR MACLEAN

24 MR MACLEAN: I can see the sense in that, in the sense that we don't know at the  
25 moment what the issues are that they're proposing to address, so you're proposing to  
26 have that dealt with at an earlier stage. I would encourage you to do that.

1 But if they're going to supply it at the same time as they supply their other witnesses  
2 of fact, then I can see that we could have a debate at that stage whether it's properly  
3 admissible, as you indicated -- whether it's factual evidence which is relevant to the  
4 issues and whether it falls into the category of expert evidence.

5 No solution is perfect in the sense that we would like to have known before now what  
6 issues they were going to propose that they address, and who the individual was. But  
7 as a --

8 THE CHAIRMAN: MacLean, what I don't want to happen is that you serve your factual  
9 evidence not knowing what this chap's going to do, whether it's admissible or not.

10 MR MACLEAN: Yes.

11 THE CHAIRMAN: Look, there's a premise there that trade evidence can be admitted  
12 as factual evidence. If it's not factual evidence, you can apply for it to be expert  
13 evidence. But it may not be admissible even as factual evidence at all, depending on  
14 the analysis of the relevant authorities, which no one's -- apart from you -- really willing  
15 to engage with what the law is on this.

16 What I really want is to have an application prior to exchange of witness statements,  
17 and then you know where you stand.

18 MR MACLEAN: I'm obviously not going to seek to dissuade you from that, but it's  
19 rather sensible.

20 THE CHAIRMAN: You will know where you stand. No, but you'll know where you  
21 stand, and so will we, and so will Harris. Because leaving it to saying, "Well, he'll serve  
22 it at the time of a factual witness statement" doesn't really advance things in a way  
23 that --

24 MR MACLEAN: It doesn't advance in the way that you want it to be advanced.

25 THE CHAIRMAN: No, I think that's possibly --

26 MR MACLEAN: That's absolutely fine. I'm not going to seek to dissuade you from

1 that course. It's entirely sensible.

2 THE CHAIRMAN: Right. Thanks very much, Mr MacLean.

3 (10.57 am)

4 Ruling on trade evidence (submitted to the tribunal for approval)

5 (11.00 am)

6 MR HARRIS: Sir, thank you.

7 THE CHAIRMAN: I think that protects everyone. We've got a clear structure for

8 resolving that. I'm not saying today that what you're proposing is inadmissible, it's just

9 that we don't have enough information to make that decision.

10 Okay, what's the next issue that you want us to deal with?

11

12 Survey evidence

13 Submissions by MR HARRIS

14 MR HARRIS: Well, it may be that we could rattle through some of the others. We

15 started at (b), and we could probably tick off quite a few.

16 THE CHAIRMAN: Oh, you want to tick off the easy ones? Yes, okay.

17 MR HARRIS: Yes, possibly.

18 THE CHAIRMAN: So we've done (b), so we can tick off (b).

19 MR HARRIS: Tick off (b).

20 Next one is survey. I'm not sure there's a dispute here, Mr MacLean will tell me

21 otherwise. What we've done is we've just updated the tribunal in our skeleton

22 argument about --

23 THE CHAIRMAN: Yes, but one of the issues -- you're proposing survey evidence.

24 I fully understand what it is you're trying to do and why. What's not clear to me is what

25 the defendant is going to do about this process. Because when you look at this, and

26 I've come across it in trademark cases, is that when you have a lot of survey evidence,

1 there's sort of games that can be played. You go ahead with your survey, and then  
2 later on they say, "It's fundamentally flawed, you haven't done this, you haven't done  
3 that", and then it's all a bit of a mess.

4 In other cases, you have engagement between both parties, and you actually agree  
5 how the survey is going to be done and what the relevant questions are. Then  
6 obviously both parties can talk about what the results are. So I think I would like to  
7 know which scenario we've got, because I --

8 MR HARRIS: I'm proposing the latter, sir, if you were to --

9 THE CHAIRMAN: I know what you're proposing, of course.

10 MR HARRIS: Yes.

11 THE CHAIRMAN: What's not clear to me is to what extent the defendant is going to  
12 go down that route, because MacLean may take the view, "I don't like the whole idea  
13 of survey evidence, it quite often doesn't give a clear result, and there's lots of different  
14 ways of interpreting it". And so he will say, "I'm not going to engage with this process",  
15 and he may have a tactical reason for not engaging in the process, because it's a lot  
16 easier to criticise it later if he hasn't had any input into the questions for the survey.

17 On the other hand, he may say, "Well, Royal Mail think that actually there could be  
18 some value in the survey route, and we want to make sure that the questions are the  
19 right questions being asked in the survey, and there are questions we'd like to have".

20 What we don't want, which has happened in other unfortunate cases, is where both  
21 parties have their own surveys and it's just a mess and that you can't really align the  
22 results between the two.

23 MR HARRIS: Yes.

24 THE CHAIRMAN: So for my part, I think we should try, if we can, come to a landing  
25 on how everyone expects his survey route to come out.

26 MacLean may say to me, "Look, we're not really ready to come to a view precisely on

1 this; let's see the survey. Let's see the design of the survey. Let's see the questions  
2 you're trying to do, what the pool is and how you're going to do it".

3 At that point, I may want to come back and say, "We're going to say nothing", and just  
4 let you go down your route, or we're going to say, "Well, we've got our own particular  
5 questions, or reformulated questions", and then you have it that way.

6 I think it's really down to MacLean to tell us how Royal Mail want to play this, because  
7 I can see what you're doing, why you are doing it, and it makes sense. I also think  
8 that it may be sensible, insofar as you're going to ask specific questions on the survey,  
9 that they are looked at by the tribunal and the other side before you start that survey  
10 process.

11 So cooperative survey process is much better than a unilateral survey process,  
12 because you can spend a lot of money on something and then only be told, "Actually  
13 you've got it wrong, you're asking the wrong questions".

14 MR HARRIS: Sir, yes, I'll cede the floor in just a moment.

15 THE CHAIRMAN: Yes.

16 MR HARRIS: That is the proposal that we identify: the questions and the structure to  
17 both the tribunal and to Royal Mail, and that they have the opportunity to input if they  
18 take that opportunity. So far, so good.

19 The only other point I'd just like to add before I cede the floor is that I have experience  
20 in which the other side makes criticisms or suggestions about the design and/or  
21 content of the survey, but some of which are rejected by the party who's  
22 commissioning the survey.

23 So in other words, there's some movement, or some, if you like, substantive  
24 collaboration and adjustment, but it must be open to the party who's commissioning  
25 the survey to say, unless ordered otherwise, of course, "Well, actually, I don't accept  
26 that criticism".

1 And then that criticism will doubtless recur at trial, when the party says, "Oh, you  
2 should have listened, you should have done this, you didn't. Therefore it's not worth  
3 the paper it's written on".

4 THE CHAIRMAN: Okay, so there's a number of ways you can do it, aren't there?  
5 Because you may say, what you'll do is you'll design the survey, you'll design the  
6 questions, we see what your proposed pool is, you send it to MacLean's side, and then  
7 they come back with comments, and they can either say, "This is wholly  
8 misconceived", or they can say, "Actually, we can see some merit in this, but you need  
9 to ask additional questions or do it slightly differently". And then you may say, "Well,  
10 look, I don't want to take too much of a risk on this, let's go back to the tribunal so we  
11 can have a short hearing, look at the survey, look at the questions and see whether or  
12 not the tribunal thinks it's a worthwhile exercise and whether the points being made by  
13 Royal Mail are good or bad, rather than leaving it to trial". So many times I've come  
14 across surveys, they're expensive and it's two ships passing each other at night, and  
15 then you spent a lot of money and the tribunal says, "Well, you know, you produce  
16 something, but it doesn't really help anyone".

17 MR HARRIS: We agree entirely. We do envisage engaging with the tribunal, whether  
18 we are hearing or in writing or a mixture of both. So unless I can assist further right  
19 now, perhaps it's for Mr MacLean to respond as best he can at the moment.

20 THE CHAIRMAN: No, of course.

21 Submissions by MR MACLEAN

22 THE CHAIRMAN: Yes, Mr MacLean, thank you.

23 MR MACLEAN: That sounds sensible. Let me just say that, in our skeleton pointed  
24 out to the tribunal, that we hadn't had any proposals.

25 THE CHAIRMAN: Exactly. It's impossible for you to know what to do until we know  
26 what the proposal is, who's it going to be done by, what the questions are, how that

1 relates to the issues in the pleadings.

2 I'd like to have a landing. I know we're not going to have a landing today, because  
3 you haven't got the ammunition to answer, but we will want to have a process whereby  
4 we can give directions for Harris's side, in relation to the survey today, and a process  
5 for that, so you can have the opportunity to comment, and then they can look at what  
6 you come up with, and then we come back to the tribunal next time round, and we're  
7 saying, "Okay, we've now got a survey proposal; does it need to be modified? Is it  
8 a complete waste of time? Whatever".

9 MR MACLEAN: Or points in between. I mean --

10 THE CHAIRMAN: Yes, it could be.

11 MR MACLEAN: I entirely agree, that if they want to do a survey, let's see what it is,  
12 we'll comment, the tribunal will give us directions as to when this all should happen.

13 THE CHAIRMAN: Yes.

14 MR MACLEAN: And in the event we can't agree that it's a useful exercise, or it's only  
15 partly a useful exercise, well we'll come back in, the tribunal will resolve it, either orally  
16 or on paper. We're in your hands, sir --

17 THE CHAIRMAN: Okay, that's fine, thank you.

18 MR MACLEAN: -- as far as that's concerned.

19 MR HARRIS: Sir, I think those are in our paragraph 11.

20 THE CHAIRMAN: I think what MacLean has said makes a lot of sense. So let's see  
21 what you've got in the draft.

22 MR HARRIS: Yes. I'm referring to our skeleton argument for today, paragraph 11 on  
23 internal page 12, second paragraph.

24 THE CHAIRMAN: Is it in the draft order, or not?

25 MR HARRIS: Let me check.

26 THE CHAIRMAN: Okay, you want me to look at your skeleton? Yes.

1 MR HARRIS: It's the skeleton argument --

2 THE CHAIRMAN: Yes.

3 MR HARRIS: -- internal page 12, paragraph 11. (Pause)

4 THE CHAIRMAN: I looked at that before; it doesn't help us. That looks contrary to

5 what we were saying earlier, that that just looks like a unilateral exercise. What I'd like

6 is a real structure, whereby you prepare your survey questions methodology, we have

7 a precise date for that. We then have a direction, that Royal Mail respond by a certain

8 date. You then respond to them, and then if there's any dispute between the parties

9 as to the survey in its structure, and even if there is no dispute, I'd like to see it before

10 it starts, that you'll serve it on the tribunal, and then we will look at the survey.

11 So, it's like the list of issues. It's like the pleading issue that we looked at, the

12 bindingness. You two can go out and try and agree what you can, but once you've

13 gone out -- and we'll be looking at your schedule later -- it's for the tribunal to say,

14 "Yes, we're happy with that or we're not happy with that", and I think the survey's

15 sufficiently important, and you're right to flag it, that it's probably something that the

16 tribunal is going to have to look at before you press the button.

17 MR HARRIS: Sir, yes. If you look at the end of item 1 on line 2 of paragraph 11,

18 comment for comment, that's intended to be what we've been discussing. And

19 likewise, in item 3, pre-penultimate line, shared with Royal Mail for any final input

20 because they would have already provided earlier input.

21 But, what we totally agree with, and I'm not sure this needs to be done, if you like,

22 orally, is I am confident that a sensible process that you've just outlined can be agreed

23 with my learned friend.

24 THE CHAIRMAN: I think given what he said before, I think it can be. But I want

25 something more precise than what we've got it in 11, and even before the pilot survey,

26 we want comments from Royal Mail. You then do your pilot survey. You then come

1 up with your final proposed methodology and questions. You then have Royal Mail  
2 coming back, and then it comes to the tribunal.

3 Now, if it's all agreed, then you'll just be writing a letter saying, "Dear tribunal, it's been  
4 agreed. Here is the survey and it's all fine". Or, it may be that it's not like that, in which  
5 case we're going to have to resolve it; I'm quite happy to do it on paper, or we have  
6 a hearing. But if either party wants to have a hearing on this, we will have a hearing.

7 MR HARRIS: I understand exactly. Why don't we do this: why don't we see to agree  
8 the process and the dates with my learned friends? If that can't be agreed, then it can  
9 be put to the tribunal on paper, in the form of order for today, finalising the order for  
10 today. But we hear exactly what you say and we agree with it.

11 THE CHAIRMAN: Okay.

12 MR HARRIS: So may I just take a moment to confer with Mr Rayment about dates?

13 THE CHAIRMAN: Well, we don't -- look, we'll have a break at some stage, and then  
14 you'll come up with an order.

15 MR HARRIS: Okay.

16 (11.13 am)

17 Ruling on survey evidence (submitted to the tribunal for approval)

18 (11.16 am)

19 MR HARRIS: Sir, thank you.

20 THE CHAIRMAN: So can we tick C off?

21 MR HARRIS: B and C.

22 THE CHAIRMAN: Shall we deal with the binding findings preliminary issue?

23 MR HARRIS: Yes.

24

25 Binding findings

26 THE CHAIRMAN: So what I've done is: I've read the progress that you've made, and

1 I can see that a lot has been agreed, and that's constructive, and I can see that Royal  
2 Mail, some of them say, "Well, we don't necessarily accept it's binding, but it's not  
3 worth the candle", and at the end of the day, that's where it is.

4 There are some pretty fundamental, important ones, in the second half of the  
5 schedule, which are the ones where bindingness is disputed by Royal Mail, and those  
6 will be resolved at trial, either by submission saying, "Well, look, we don't agree they're  
7 binding", or by an application saying, "Well, the circumstances of the case should  
8 disapply that". And there are some pretty important issues hidden inside all of that,  
9 such as the effect of the infringement, and whether or not the infringement found had  
10 an effect, and what was that effect, and you have the relevant paragraphs in the  
11 decision, which are identified here, which Royal Mail say are not necessarily  
12 consistent with what was said about what are we going to actually come to on  
13 conclusive findings, and are they really conclusive findings, and are you not, in any  
14 event, to go round those issues and look at them in detail at trial, and in particular, I'm  
15 looking at the issue of: did the conduct alleged cause, or at least contribute pulling the  
16 plug decision, and when you say pulling the plug decision, it's both by the lenders, the  
17 funders or whatever, and also by Whistl.

18 And then what is the longer term effect? Was this conduct such that basically it  
19 stopped Whistl coming back at all? And that is an issue which is, I think, going to be  
20 quite a big major live issue at trial, irrespective of what's been said in the decision, or  
21 by the tribunal, when it came to its decision.

22 So I'm very happy with the way it's been done, it's pretty clear where the battle lines  
23 are. Are there any particular points, Mr Harris, you'd like to show us and take us  
24 through? What I did find extremely helpful was the annexes at the end, which were  
25 really clear, crystallised the issues, and easy to absorb. You know, sometimes in this  
26 tribunal, things are very difficult to absorb, but this was a very, very helpful schedule,

1 and the annexes really clear. I can understand what your position is, I can understand  
2 what Royal Mail's position is, it's all fairly clear and it's in a proper order, and we'll be  
3 able to resolve those issues at trial.

4 MR HARRIS: Sir, nothing to add.

5 THE CHAIRMAN: Okay. MacLean?

6 MR MACLEAN: Nor do I, sir.

7 THE CHAIRMAN: Okay, thanks very much. So we can tick that one off.

8 MacLean, there's just one thing I did mean to ask you, which is that -- I noticed it's a bit  
9 different from the one we looked at, and I approved in Whistl. So there are some  
10 issues which seem to be live on this one, which weren't live on the other one. Can  
11 you quickly just explain where we are on that?

12 MR MACLEAN: No, I can't.

13 THE CHAIRMAN: You can't? Okay. Don't worry then.

14 MR MACLEAN: The honest answer.

15 THE CHAIRMAN: Yes, okay.

16 MR MACLEAN: I haven't come prepared to --

17 THE CHAIRMAN: Don't worry about it.

18 MR MACLEAN: So in the light of the fact that it was agreed that this was going to the  
19 trial, I know that it's subject to the tribunal, saying, "Well, I agree with that, but in fact,  
20 I'm not here ready ..."

21 THE CHAIRMAN: No, I can see on some of them where you explain why, although  
22 there's bits in here where you explain why you're contesting it now, you didn't contest  
23 it before. But there seems to be a point hidden there somewhere, where it's just purely  
24 a jury point or not, I haven't figured out yet, saying actually, why aren't you agreeing  
25 something you've agreed before? Is this an inconsistency? And is that something  
26 that's going to be exploited at trial? I don't know. Mr Harris, is that something that

1 | you're going to be raising at trial or not? Ie that they were happy to agree certain  
2 | things in the Whistl schedule, which are not agreed in this schedule, and does that  
3 | take us anywhere?

4 | MR HARRIS: I'll have to take instructions. My instinct is possibly not, but I haven't  
5 | turned my mind to that in detail.

6 | (11.21 am)

7 | Ruling on binding findings (submitted to the tribunal for approval)

8 | (11.22 am)

9 | Mr Rayment, is there anything -- do you understand that? Is that an issue that -- you  
10 | were nodding -- your head was moving left and right. I don't know what that means.

11 | MR HARRIS: Sir, yes, we agree is the answer.

12 | THE CHAIRMAN: You agree.

13 | MR HARRIS: We agree with that, although it doesn't need to be dealt with today, yet,  
14 | sir.

15 | THE CHAIRMAN: No, of course not.

16 | MR HARRIS: No, but at some stage we'll need to give dates so that that's done  
17 | sufficiently far in advance of trial, that it --

18 | THE CHAIRMAN: No, no, that could be part of the trial submissions. I'm just -- have  
19 | it as a separate annex to the skeleton argument for trial. It's just that I don't expect  
20 | any extra work to be done; I just want a structure so when we come to the trial, we  
21 | know, "Yes, MacLean is saying this particular finding. Even if it's binding, this is why  
22 | we say you should disapply". That's all. It's not a big deal. Okay, so I can tick that  
23 | one off.

24 |

25 | Class member customer group

26 | Submissions by MR HARRIS

1 MR HARRIS: Yes, so by my reckoning, we're now to (e), class member customer  
2 group.

3 THE CHAIRMAN: Right. (Pause)

4 Yes, because when MacLean did his skeleton, he didn't have the benefit of the  
5 correspondence on that.

6 MR HARRIS: Yes.

7 THE CHAIRMAN: Okay, so can you just update us where we are on that?

8 MR HARRIS: (Overspeaking) we're happy to put this in a letter to the tribunal and my  
9 learned friend, because it's been moving over the last few days. The position is this:  
10 as at this very moment, there are six members of the customer group. It is possible  
11 that a seventh member will join during the course of today. So you've got  
12 (overspeaking) --

13 THE CHAIRMAN: Yes, okay. We're looking for ten, aren't we, ideally?

14 MR HARRIS: We were looking for --

15 THE CHAIRMAN: Around 10. So if it's nine, I don't mind. If it's eight, that's probably  
16 okay. If it's more than 12, it's probably a bit too unmanageable. You know, just  
17 somewhere --

18 MR HARRIS: It's an ongoing process. While we haven't found an enormous amount  
19 of enthusiasm to join, we have contacted well over 70 companies and it's an ongoing  
20 process. But we have made some progress. Last time there were five, today there  
21 are six, and with, I'm told, a reasonable prospect that by the end of today there'll be  
22 seven. And we've not finished. (Overspeaking).

23 THE CHAIRMAN: Yes, good. Brilliant. Good.

24 MR HARRIS: So that's where we are as of today. If you like, I can rattle off -- so the  
25 position is that not a single one of those people is willing to provide its identity to either  
26 Royal Mail or the tribunal, but five of them are willing to provide -- and I can do this

1 now -- their industry sector.

2 THE CHAIRMAN: So five will give industry -- yes.

3 MR HARRIS: Yes, and I am told that if the seventh member joins, which may happen  
4 today, that person would also be prepared to give its sector.

5 THE CHAIRMAN: Yes.

6 MR HARRIS: But one of the members is not willing to provide details of its sector or  
7 sectors, because its position is that then there's a reasonable chance that people will  
8 be able to figure out, and in particular Royal Mail, who it is; its actual identity.

9 THE CHAIRMAN: That's fine. I understand that. If what you're saying is, is that -- let's  
10 say you define the sector too narrow, it may be easy to identify the person. But let's  
11 say the person's in the hospitality sector, you may be able to say that without actually  
12 giving away their identity. It may be that there is a sort of halfway house even on that  
13 person if you define their sector wide enough.

14 MR HARRIS: We've explored that with that particular -- why don't I do it this way?  
15 I can tell you in broad terms the five sectors for the five existing experts --

16 THE CHAIRMAN: Yes, let's do that.

17 MR HARRIS: -- and as I say, we can put this in writing. Telecoms, retail, energy and  
18 utilities, publishing, and health. If the seventh member joins today -- if that's  
19 finalised -- that's also a retail sector.

20 But for the purposes of today, number 6 on the list is the one that spans several  
21 sectors. We have explored whether they'd be prepared to give either just one or  
22 a fairly compendious sectoral identifier.

23 THE CHAIRMAN: No, but what you could say in relation to that one is say: look,  
24 number 6, or whatever, is involved in a range of sectors across the range, or whatever.  
25 I don't need to know any more than that, particularly given the ones you've already  
26 identified.

1 MR HARRIS: It may well be -- we will try. What we have explored is what they're  
2 willing to provide and at the moment, subject to going back and making that further  
3 suggestion, they're not willing to provide any sectoral information.

4 THE CHAIRMAN: But what I'm saying is if the position is that you've got one person,  
5 one entity that cuts across a range of sectors, that's enough for you to say number 6  
6 cuts across a range of sectors. Because what you've given me in 1 to 5, in my view,  
7 is an ideal range of sectors for what we envisage the customer group is therefore.

8 MR HARRIS: Great. Well, in that case, I anticipate, but I can't promise on their behalf,  
9 that they will be happy to join or remain in, if you like, and just say, "We're in a range  
10 of sectors".

11 THE CHAIRMAN: Yes, that's enough.

12 MR HARRIS: I can update the tribunal --

13 THE CHAIRMAN: Because now you've told me what the other five are -- unless  
14 MacLean says he needs something more, but I think that that -- you know what we're  
15 trying to do, having this consultative group, and what you've done is exactly what was  
16 envisaged. I don't need to go any deeper, because at the end of the day the CR will  
17 be dealing with those people, feeding off ideas from them, or want to speak to them,  
18 if necessary sharing confidential or privileged information if they want to, and try and  
19 keep a lid on what they're doing.

20 But as long as there is participation and interest by people who've got a claim, that is  
21 good. Because you'll understand from a number of decisions that have been issued  
22 on settlements that there is a concern that you may have lots of people with small  
23 claims, but when it comes to settlement and getting recoveries, you may not have that  
24 many people coming forward with an interest. Then you brought proceedings at great  
25 cost, and very little money is going to be distributed to those persons for whom the  
26 proceedings have been brought. By having a group like this and engaging with

1 a group like this, one would hope that you will, on this particular case, not have that  
2 problem.

3 MR HARRIS: Well, I'm pleased to report, sir, that the customer group is already  
4 proving of use and continuing use to Mr Aaronson and the claimant.

5 THE CHAIRMAN: Yes.

6 MR HARRIS: We anticipate that they will continue to be so, and we will continue to  
7 try to add another a couple of members to try to reach the magic number 10.

8 THE CHAIRMAN: MacLean, anything you want to say?

9 Submissions by MR MACLEAN

10 MR MACLEAN: Well, I've got a couple of things I'd like to say.

11 THE CHAIRMAN: Yes, there's always things you'd like to, but that's fine. Please say  
12 what you want to say.

13 MR MACLEAN: I hope they're helpful to the tribunal.

14 So this is the first time that we've heard about the sectors. It's not clear why that  
15 couldn't have been provided to us in writing beforehand. We have asked and we have  
16 been asking.

17 THE CHAIRMAN: Yes, I know. We are where we are.

18 MR MACLEAN: We are where we are. That's right.

19 Now, you, sir, used the interesting phrase, "participation and interest", of these  
20 sectorial individuals. Now, given that they have an interest, as they plainly do, and  
21 given that there is some form of participation, we suggest that there is no reason  
22 whatsoever why they should be so shy about having their actual identities revealed to  
23 the tribunal and to those on this side of the court. There is no basis for secrecy  
24 advanced in any evidence or in any submission to you. This is a new type of  
25 stakeholder. They are participating in these proceedings in the clear hope of financial  
26 reward; possibly, they would say, substantial.

1 In our submission, there's obviously an issue of open justice. We are facing  
2 participating parties who are unwilling for their own identity to be revealed to us on the  
3 other side and to the tribunal.

4 Now, it seems to have been intended -- and you may tell me I'm wrong, sir -- the  
5 tribunal wanted these representatives to have possibly some influence on the  
6 proceedings.

7 THE CHAIRMAN: I don't know about that. I just --

8 MR MACLEAN: Or input, let me put it that way. Input. They may have a particular  
9 angle as to the arguments to be run, given the particular sectors in which they are  
10 involved. In our submission, it would be entirely proper as a matter of open justice for  
11 their names to be revealed to us, seeing there is absolutely no cogent reason  
12 advanced why not; no evidence why not.

13 I don't make any bones about it, but if those names are revealed, we may want to  
14 consider whether as represented parties we ought to apply to the court for an order  
15 for disclosure.

16 Now, the last time we were here, my learned friend said that was a terrible, terrible  
17 thing to suggest. But the fact is, without knowing who these individuals are, the  
18 suggestion that they might be so shy as to participate no longer is without any  
19 evidential basis.

20 So we do say that it is not satisfactory for there to exist this penumbra, where we know  
21 there are sectors but we don't actually know who it is that is on this representative  
22 committee.

23 That's what I've got to say about that.

24 THE CHAIRMAN: Thanks very much.

25 (11.33 am)

26 Ruling on class member customer group (submitted to the tribunal for approval)

1 (11.38 am)

2 MR HARRIS: Sir, thank you.

3 THE CHAIRMAN: Let me just say one further thing. As we pointed out last time, you  
4 have to distinguish between two things: one is a concern by people that they might be  
5 picked on; and two is whether or not that concern is at all likely to happen.

6 (11.38 am)

7 Ruling on class member customer group (continued) (submitted to the tribunal for  
8 approval)

9 (11.40 am)

10 THE CHAIRMAN: That's just an additional point. I'll feed that into the ruling when it  
11 comes out, when we issue it tomorrow, if I've got time to -- assuming the transcript  
12 comes back early enough, you'll get it tomorrow. Yes.

13 MR HARRIS: Sir, thank you. That's issue number (e). I'm in your hands --

14 THE CHAIRMAN: It's not a big issue, it's just that, you know, Mr MacLean's right to  
15 make the application and I fully understand where he's coming from. But insofar as  
16 he feels he needs information from the class members, you have to remember that  
17 they are their customers, they have a huge amount of data, they know who their  
18 customers are, and that they probably don't need to get documents from them because  
19 they've all got the relationship and they've got their own -- they know what's going on.  
20 Insofar as they feel they need material from their customers, obviously they can ask  
21 their customers, or if necessary, they come back to the tribunal for an order. I'm not  
22 saying at this stage that the tribunal is against any application for non-party disclosure  
23 if Mr MacLean feels that the end of the day that's necessary.

24 Anything else, Mr MacLean on that?

25 MR MACLEAN: No, nothing on that, sir.

26 THE CHAIRMAN: Yes, okay. So let me tick that one off.

1 MR HARRIS: Sir, it might be an opportune moment to take a five-minute break.

2 THE CHAIRMAN: We'll take our break. So we'll come back at 11.55 am.

3 MR HARRIS: I wonder, sir, whether it might be that you might then like to decide what  
4 order to take the remaining issues. For what it's worth --

5 THE CHAIRMAN: No, we will deal with next, the mailing houses.

6 MR HARRIS: The mailing houses.

7 THE CHAIRMAN: The mailing houses. Because there is an issue there, and I fully  
8 understand where Royal Mail is coming from. They do need to know who's in, who's  
9 out.

10 They probably don't even mind what the answer is as long as they know what the  
11 answer is, because I can see on one hand, you can say, "Well, they're just purely  
12 agents". And so they themselves are not within the class; they're just agents for people  
13 who are in the class and they're in that way.

14 Or it could be said, "No, they are actual members of the class; they're not access  
15 operators, and so they don't fall within that carve out", in which case Mr MacLean  
16 needs to know in which.

17 MR HARRIS: The answer is they're not in, so I can just -- but we will deal with it later.

18 THE CHAIRMAN: We'll deal with it later, but I can see why MacLean wants to have  
19 an answer to that. Whatever the answer is, there will be implications and it will factor  
20 in. But it's very good that this is coming out as an issue, because it's one of those  
21 things that sometimes only comes out at trial and then it's too late to do anything about  
22 it.

23 So mailing houses will be next, okay. I then think probably there's expert evidence,  
24 which will probably take us an hour to go through that schedule. Maybe -- should we  
25 do expert evidence after mailing houses? So I'll put mailing houses (1); expert  
26 evidence (2), then litigation budgets (3); then we'll look at, at that stage, (4) the detailed

1 | directions. During the lunch break, hopefully the juniors can start trying to agree dates  
2 | of stuff that we've already covered so far.

3 | So when we leave at 4.30 pm today, everything's clear as to what people have got to  
4 | do.

5 | MR HARRIS: Grateful, so 11.55 am?

6 | THE CHAIRMAN: Yes, so we're back at 11.55 am.

7 | MR HARRIS: Thank you.

8 | (11.44 am)

9 | (A short break)

10 | (12.00 pm)

11 | THE CHAIRMAN: Where do I find the Ofcom decision?

12 | MR HARRIS: That is tab 1 of the core case management bundle. Tab A1, a rather  
13 | bulky document.

14 | THE CHAIRMAN: Thank you, Mr Harris. Just to finish off on the composition of the  
15 | customer group. I just want to say something on that. You can sit down for a second.

16 | (12.01 pm)

17 | Ruling on class member customer group (continued) (submitted to the tribunal for  
18 | approval)

19 | (12.03 pm)

20 | THE CHAIRMAN: Sorry about that, Mr Harris, I didn't occur to me until Mr Sawyer  
21 | pointed it out during the break that we'd need someone from the financial services  
22 | sector.

23 |

24 | Mailing houses

25 | Submissions by MR HARRIS

26 | MR HARRIS: Thank you, sir. The next issue then is mailing houses. You asked me

1 before the short break --

2 THE CHAIRMAN: Yes.

3 MR HARRIS: You put to me the principal issue is: are intermediaries, as now identified  
4 in the correspondence from Royal Mail, in or out? And I said the answer is out. That  
5 is the position.

6 If I could put it into this context, from our perspective, it's all really very clear. The  
7 chain is that Royal Mail supplies the delivery services, because they're the only people  
8 who could, and the people who are in the class are the end customers of the delivery  
9 services, because they have to get their letters from their bank or their counsel offices  
10 to the recipients of those letters.

11 THE CHAIRMAN: Yes.

12 MR HARRIS: What we have never wanted -- and as far as we're concerned, we don't  
13 have -- is anyone else intermediate in that chain of supply of delivery services, for the  
14 very reason that Royal Mail has identified in the correspondence: if you have  
15 intermediate people in the value chain who are also in the class, then you have the  
16 possibility of conflict of interest, because somebody might say, "Oh, well, actually I'm  
17 the actual victim and I didn't pass on any of that victimised loss further down the chain".  
18 The next person might then say, "No, no, no, I suffered the loss. I didn't pass it on".  
19 The reason I start like that is that that is the principal reason why access operators, as  
20 the term is typically used for people like UK Mail and Whistl, they are not in the class  
21 by having been excluded. That's the reason. Had they been included, there would be  
22 this possibility of conflict of interest.

23 Against that background, what happened really rather recently -- a matter of a week  
24 or so ago -- is Royal Mail queried, "Well, we've now we're now telling you that there  
25 are other intermediate people, so not just Whistl and UK Mail; they're intermediaries  
26 of a type -- they're typically called access operators -- but they're intermediaries of

1 a type. We now are telling you there are some other intermediaries. They're called,  
2 in the language of the correspondence, mailing houses and consolidators. Are they  
3 in or are they out?"

4 The answer is: they're not in. They're out for the same reason that Whistl and UK Mail  
5 are out; they are intermediaries in the value chain. So let me be quite clear about that:  
6 they're not included, and that's the reason. The same reason as --

7 THE CHAIRMAN: If you look at the CPO judgment or whatever, and the order that  
8 was made, the only exclusion was in relation to access operators. So MacLean is  
9 right that we need to get this issue done properly. I think it would be really helpful if  
10 Royal Mail could give you a list of those people they consider fall within this class.  
11 And then we work from that there. They can say, "Well, we've got the following ten  
12 people".

13 Mr MacLean, is that a problem? Is that going to be too difficult?

14 MR MACLEAN: It is a problem.

15 THE CHAIRMAN: Just explain what the problem is.

16 MR MACLEAN: Let me just --

17 THE CHAIRMAN: Because I don't like any lack of clarity as to who's in the class.

18 MR MACLEAN: No. Absolutely, and we are content to hear from Mr Harris that, as  
19 far as they're concerned, these intermediaries are not within the class.

20 THE CHAIRMAN: And we understand why he's saying that, but we need to have it in  
21 writing, because at the moment, the class is defined in a particular way.

22 MR MACLEAN: Yes, well, that's my next point. The way the class is defined does not  
23 exclude the intermediaries in the way in which Mr Harris suggests, and perhaps I can  
24 remind you of the definition.

25 MR HARRIS: Well, sir, would you like me to deal with that?

26 THE CHAIRMAN: No, let's hear MacLean, because this is helpful. It's fine.

1 MR MACLEAN: If we look at bundle A, tab 4, page 8.

2 THE CHAIRMAN: Which bundle am I looking at?

3 MR MACLEAN: You're looking at bundle A.

4 THE CHAIRMAN: The one I just opened?

5 MR MACLEAN: It's got the pleadings in it.

6 THE CHAIRMAN: Yes.

7 MR MACLEAN: Bundle A, tab 4, page 628, where we find the class definition.

8 THE CHAIRMAN: So it's page what?

9 MR MACLEAN: Page 628 under tab 4.

10 THE CHAIRMAN: Yes.

11 MR MACLEAN: Now --

12 THE CHAIRMAN: Mine's blank, so that doesn't --

13 MR MACLEAN: Oh that's --

14 THE CHAIRMAN: Just read it, Mr MacLean.

15 MR MACLEAN: All right. Well, it's a page long.

16 THE CHAIRMAN: If it's on the screen, I can look it on the screen, yes.

17 MR MACLEAN: I'm very grateful.

18 THE CHAIRMAN: Could someone please put it on the screen?

19 MR MACLEAN: "The ... Class Members are accordingly defined as:

20 "All persons who purchased or paid for Bulk Mail Retail Services [in the period]."

21 THE CHAIRMAN: Yes.

22 MR MACLEAN: Now, "Bulk Mail Retail Services", they're defined in b:

23 "... collection and initial sortation activities ... delivery services ..."

24 Okay, now these intermediaries provide a whole range of services, as I understand it.

25 And one can go on a website of one of these companies. Paragon, I'm told, is one of

26 the very biggest. I don't know whether it was very big in 2014, but it's certainly very

1 big now. And what Paragon does is it conducts mailshots on behalf of its clients, and  
2 Paragon will do all sorts of things, like the optimisation and cleaning of data, the format  
3 of letter size, the checking that the addresses are still live addresses, and it will  
4 contract with access operators, like Whistl or UK Mail. So there's an intermediate  
5 stage between Whistl and the ultimate client.

6 The ultimate client isn't buying -- or is not necessarily buying, there may be different  
7 categories -- bulk mail services direct from either Whistl, or direct from Royal Mail  
8 itself. So there's a problem here with the existence of these intermediaries. Now, you  
9 said, "can't we just get the names?" Well, my instructions are: there are literally  
10 thousands of these intermediaries. To take one particular example, we're aware of  
11 a big bank who contracts with intermediaries, and not the access operator, in order to  
12 secure the delivery and sortation services, and it requires all sorts of other services,  
13 as I've been explaining, as well.

14 Now, if you look at the definition of "access operator" in "e", on this particular definition:  
15 "'Access Operator' means a Bulk Mail Retail Operator who procures Bulk Mail Delivery  
16 Services from Royal Mail."

17 Now, these intermediaries do not procure bulk mail delivery services from Royal Mail;  
18 they procure them from the next person up in the chain, which is Whistl, or Bulk Mail,  
19 the access operator. So, if my learned friend is going to say that they're not included,  
20 fine. But definitionally, something has to be done to this class definition, in order to  
21 make that crystal clear.

22 THE CHAIRMAN: You're entirely right; I agree with you, and I think I made that clear.  
23 Because, look, what we can't have is -- let's say this case goes to judgment --

24 MR MACLEAN: Yes.

25 THE CHAIRMAN: -- and then all these people turn up and say, "Well, these  
26 proceedings were on our behalf". And so, no, they weren't, because Harris told the

1 court they're not. And they said, well, look at the wording of the order, and they're  
2 saying, "We want our part of their chunk". So you're 100 per cent right, that it's got to  
3 be reflected in the order for the CPO. That's what goes out to the public, that's what's  
4 going to be on the website, and if the parties are able to work together, to come up  
5 with some wording that captures this, we would be really happy, because it's got to be  
6 there, publicly available, and we'll put it in the ruling, to make it clear that the class  
7 does not include these people.

8 And so, if any of these people are watching these proceedings thinking they might get  
9 their share at the end of it, they're going to be disabused of that publicly, rather than  
10 sit back and then see how it goes, and then at the end, if it goes badly, then they'll say,  
11 "Well, nothing to do with us", or if it goes well, then they'll say, "Well, we want our share  
12 of the cake".

13 MR MACLEAN: And also has other -- the existence of these intermediaries also has  
14 further consequences, in terms of the expert evidence, in pass-on.

15 THE CHAIRMAN: You explained that already. Yes, I've understood that.

16 MR MACLEAN: And so it may be that the list of issues needs to be expanded as it  
17 currently is framed, which is looking at --

18 THE CHAIRMAN: Well, it depends on this, what happens on this.

19 MR MACLEAN: The pass-on issue that we've formulated is looking at downstream  
20 pass-on, from the banks to their customers.

21 THE CHAIRMAN: Correct.

22 MR MACLEAN: Whereas the existence of the intermediaries between an access  
23 operator and the ultimate client gives rise to different questions, and gives rise to  
24 a different burden of proof.

25 THE CHAIRMAN: But as long as we know where we stand, that can all be factored  
26 in, in the evidence. But it's critical we get this right now, and you're asking for clarity.

1 MR MACLEAN: Yes.

2 THE CHAIRMAN: I'm asking for, if it is going to be clarified, it's got to be by way of  
3 the change of the definition on this, and then that goes on our website, and it'll go on  
4 the claim website, so everyone knows where they stand, and if you're able to assist  
5 Harris's team, then you should do, because it's to your advantage.

6 MR MACLEAN: I understand. The only caveat I make is it's not necessarily easy for  
7 Royal Mail, definitely, to say these are who these individuals are -- not these  
8 individuals, these companies -- not contracting directly with Royal Mail. Now, you're  
9 right: Royal Mail has a lot of knowledge of the market.

10 THE CHAIRMAN: It does, yes.

11 MR MACLEAN: But these companies are not direct contractors, in most cases. There  
12 are some situations where they do contract directly with --

13 THE CHAIRMAN: Yes. Sometimes you say there's some, directly with you or others --

14 MR MACLEAN: Yes, others. The majority don't contract directly with us. So I'm just  
15 making that point, that the tribunal doesn't go away with the impression that we know  
16 all these people are.

17 THE CHAIRMAN: No, but what you can do is to come up with a definition that  
18 excludes from the class what we're talking about.

19 MR MACLEAN: Yes.

20 THE CHAIRMAN: And what we can't do is to leave it open with any lack of clarity.  
21 And so we will make a direction, that this is going to be clarified, and the parties are  
22 going to come up with a proposed wording, that deals with what's excluded, or which  
23 companies are excluded from the class. And there's a number of different ways that  
24 you can do it within the definitions, but it's got to be done. I agree with it.

25 MR MACLEAN: I also flag at this stage, for the tribunal's consideration, that we will  
26 have to consider making an amendment to the defence, in the light of this.

1 THE CHAIRMAN: Yes, I can see. Yes, you're right, yes. But I think stage one is to  
2 get the CPO order amended, to reflect where we are on this, and I don't think it's  
3 necessarily easy for the CR to do it on their own; I think both sides have got to sit  
4 together and come up with a wording. If you can't agree, then obviously we'll give  
5 a ruling, and in the ordinary course, if there's different definitions, then send us a draft,  
6 give us the two options, explain what are the differences of the two, and why there is  
7 a difference, and we can deal with it on paper.

8 MR MACLEAN: I'd be grateful.

9 THE CHAIRMAN: I hope not. I honestly hope that you and Mr Harris can agree.

10 MR MACLEAN: I rather imagine it will be for McIntyre and Rayment, but anyway --

11 THE CHAIRMAN: They may agree, but at the end of the day, it's you. It's your  
12 responsibility, you're the leader on this case, and this is sufficiently important that  
13 I want you to be engaged on it personally, that you look at the wording.

14 MR MACLEAN: I will look at the wording.

15 THE CHAIRMAN: That's fine. The juniors can draft it for you, but I do want someone  
16 at your level looking at it.

17 MR MACLEAN: Okay.

18 THE CHAIRMAN: Thanks very much, Mr MacLean. Yes.

19 MR HARRIS: Sir, we're content with that approach. We will liaise with Royal Mail,  
20 early next year. There will either be an agreed clarification within the class definition,  
21 or there'll be a version upon which you have to make a decision. (Pause)

22 (12.16 pm)

23 Ruling on mailing houses (submitted to the tribunal for approval)

24 (12.19 pm)

25 THE CHAIRMAN: So that deals with that issue. Right. So we can tick off something  
26 else, can we?

1 MR HARRIS: And we were reverting to the top of the agenda. There are various  
2 subtopics on expert evidence: 1, 2 and 3.

3 THE CHAIRMAN: Yes. Give me a second. (Pause)

4 Okay.

5

6 DiD model

7 Submissions by MR HARRIS

8 MR HARRIS: Item 1 ought to be relatively short. Dr Williams has proposed, if you  
9 like, invitation to tribunal, whether or not you'd like to add any further countries for the  
10 DiD comparison model. And you may have seen he's written a relatively lengthy  
11 letter -- five or six pages -- explaining that, yes, on reflection, he would like to include  
12 the Netherlands. There's various caveats, and there's various further explanation  
13 about how it will be used and if it will succeed --

14 THE CHAIRMAN: Have you got the time period point? You can say that you can  
15 accommodate for that.

16 MR HARRIS: Yes, indeed. Since, for lack of a better word, the invitation was offered  
17 to Dr Williams to consider again other countries and him writing that letter, he has  
18 looked at a lot of further countries. In his letter he explains that having looked at  
19 essentially all of the euro countries that are subject to the postal directive, all of the  
20 others are no good, save for the Netherlands, and the Netherlands he now wishes to  
21 include, albeit he explains the context and, if you like, the caveats. So he's already  
22 looked at the Netherlands, so there's no particular problem with the timetable subject  
23 to --

24 THE CHAIRMAN: What my recollection is, is that one of the criticisms being made by  
25 Royal Mail's expert is: why have you excluded the Netherlands and now you're going  
26 to include it? We think it makes a lot of sense to include the Netherlands.

1 | If you're going to do the DiD model, you've got Sweden, Germany and Netherlands  
2 | is -- for the reasons your expert's given and for the reasons that Royal Mail had  
3 | expressed in another report, which I can't remember which one it is, but that can be  
4 | added to the ruling -- clearly is a, let's say, near the top of the list as one that should  
5 | be given consideration if you're going to go down the DiD model. You can address  
6 | what the differences are and what the caveats are in the model.

7 | MR HARRIS: Certainly, that's exactly what it says.

8 | THE CHAIRMAN: So the tribunal notes the position, understands it and makes a lot  
9 | of sense.

10 | MR HARRIS: I'm grateful.

11 | Just two further things, then, on this subtopic 1.

12 | THE CHAIRMAN: Yes.

13 | MR HARRIS: You don't need to turn it up, but just so that you're aware, in the footnotes  
14 | to Dr Williams' letter where he explains he's chosen the Netherlands, he's going to  
15 | include it, one of the reasons is because of the references to the Netherlands in various  
16 | of the confidential disclosure that I don't want to read out.

17 | THE CHAIRMAN: That's all right.

18 | MR HARRIS: So just so that you know, there's another reason why he's seen it now,  
19 | although the disclosure exercise plainly isn't complete, but it's been started, et cetera.  
20 | So that's the first point. Just for your information.

21 | THE CHAIRMAN: On disclosure, we will want to talk about disclosure, and we'll  
22 | probably -- can I just add that to my list of things I want to discuss at the end. Because  
23 | what I would like to hear is where are we on disclosure and what how we anticipate  
24 | the difficulties are, the Redfern schedule process and all that. We may end up dealing  
25 | with that as part of the directions to trial.

26 | MR HARRIS: That's what I had anticipated.

1 THE CHAIRMAN: Yes, and that's absolutely fine.

2 MR HARRIS: The second and final point, at least for me on this sub-item 1 is that we  
3 have now been provided with the Hunt-Grantham joint report. That's item 2, so we're  
4 going to come on to it. But the reason it's relevant also, in my respectful submission,  
5 to item 1 is that in two places in the Hunt-Grantham joint report -- so that's to be found  
6 in case management bundle B1, tab 9. We're probably going to be turning it up in  
7 a moment anyway.

8 THE CHAIRMAN: You can assume that it's been read, okay?

9 MR HARRIS: Yes, so in two places --

10 THE CHAIRMAN: Hopefully I've understood it, but maybe I haven't, so you're perfectly  
11 entitled to show us what you might want me to look at.

12 MR HARRIS: Well, it's relevant on sub-item 1, in my submission, for this reason, that,  
13 taking a step back, what the tribunal wanted to know so that it's out there on the table  
14 so that both parties can prepare and the tribunal, is which countries are we going to  
15 rely upon for the DiD model.

16 But it follows, we respectfully submit, like night follows day, that if we're being upfront,  
17 as we both are and should be regarding our comparator countries, the same should  
18 follow for Royal Mail. If you look at paragraph 20(b) and 27 of the joint report from my  
19 learned friend's experts, you'll see that it's replete with references to the "other  
20 countries", that in particular, Mr Hunt, the expert economist, wishes to rely upon as  
21 part of his positive case or the joint expert positive case for Royal Mail.

22 I make simply this point, that it was quite right, in my respectful submission, for us to  
23 be told to identify the comparator countries and think again and see if there are any  
24 more, and we've done exactly that. In the same way, it would be it should be directed  
25 that Royal Mail identify the "other countries" upon which Mr Hunt proposes to rely at  
26 least in 20(b) and in 27. He says, for example --

1 THE CHAIRMAN: Okay, I'll just look at 27 as well.

2 MR HARRIS: Yes.

3 THE CHAIRMAN: Because I haven't marked 27. I've marked 20 ... (Pause)

4 So it's fair enough. It makes sense that he does that, but you're saying that you need  
5 to know upfront before you serve your expert report what are those countries he's  
6 looking at.

7 MR HARRIS: Well, exactly. It's exactly the point. Because otherwise, there'll be the  
8 ships passing in the night issue. What's more interesting is, at least on our side of the  
9 fence, what we had apprehended from the earlier, I think, report, and if it wasn't  
10 a report, a letter from Mr Hunt on behalf of Royal Mail on the comparator model, was  
11 it's essentially no good. You can't compare for various reasons. That was dealt with  
12 at the CPO stage and it was said it's not a problem, at least at this stage.

13 So what we had understood prior to receipt of this report was, "Oh, well, no comparison  
14 with any country is any good. It's fundamentally flawed. Comparator countries don't  
15 work". But now, what we're told is something really rather different, which is, "Other  
16 countries are useful and I am in fact going to rely upon them". He says in terms:  
17 "Other countries could be useful in understanding ... and such analysis would be  
18 broadly qualitative in nature, considering carefully the differences between countries."  
19 [as read]

20 THE CHAIRMAN: But I'm not sure he's -- he's not talking about a DiD model there,  
21 that's (overspeaking).

22 MR HARRIS: No, no, but what we had understood prior to this was Royal Mail's side  
23 is not going to be relying upon comparator countries for anything because it had only  
24 arisen in the context of the DiD and we were told that's completely misconceived.

25 But it now transpires that Royal Mail is going to be relying upon comparator countries.  
26 What we respectfully contend is that there should be further particularisation of this

1 and specifically the countries, because otherwise we won't be able to deal with it and  
2 nor will the tribunal. And that's not a "cards on the table" approach, and everything  
3 we've been doing so far with the experts is a "cards on the table" approach.

4 THE CHAIRMAN: You say that MacLean succeeded on this point against you last  
5 time, and so you want to boomerang it back and say, "Well, for the reasons you gave  
6 last time, we want the same information from your expert".

7 MR MACLEAN: I'm happy (overspeaking).

8 THE CHAIRMAN: We'll see what he comes up with, but let's hear what Mr MacLean  
9 says, because it's not -- it is a bit like apples and oranges, but ...

10 MR MACLEAN: I'm afraid this is just a silly tit-for-tat response.

11 THE CHAIRMAN: Maybe it is, but --

12 MR MACLEAN: Well, no. It's important.

13 THE CHAIRMAN: Okay.

14 MR MACLEAN: We've got a letter yesterday saying, "We've shown you ours, now  
15 show us yours".

16 THE CHAIRMAN: Yes, okay.

17 MR MACLEAN: All right? That's what they're saying.

18 THE CHAIRMAN: Sounds like school, doesn't it?

19 Submissions by MR MACLEAN

20 MR MACLEAN: Well, it does, rather. The point is this, that the reason that we got into  
21 the comparators in the first place was because we've got this DiD model.

22 THE CHAIRMAN: You don't like the model -- you've criticised it.

23 MR MACLEAN: We think the model is hopeless.

24 THE CHAIRMAN: And you're not even going to do it yourselves for the reasons that  
25 you've given me.

26 MR MACLEAN: We're not going to do it ourselves. Absolutely.

1 THE CHAIRMAN: Yes. You're not asking us to resolve that, obviously, no.

2 MR MACLEAN: Well, no, no, no. We've got beyond that stage.

3 THE CHAIRMAN: We have, yes.

4 MR MACLEAN: They've got certification. We've had three reports. We still say the

5 DiD model is hopeless. We're not doing a DiD model.

6 THE CHAIRMAN: No, you're doing the --

7 MR MACLEAN: Well, we're doing a qualitative analysis --

8 THE CHAIRMAN: (Inaudible) what you're going to do.

9 MR MACLEAN: -- which, he says, may be assisted by looking at other countries.

10 Now, until he's done the research he can't tell us which countries may or may not be

11 helpful. It may be that we find ourselves that he looked at all of the countries in

12 Europe -- I'm not saying he's going to -- and may say, "Actually, this sort of approach

13 has only succeeded in three countries, or two countries: Germany and Sweden".

14 Now, if he's going to look at on that basis -- and I don't know whether he is or he

15 isn't -- you can't expect us to say, "Well, the countries are all the countries in the world

16 or all the countries in Europe". That's not a helpful bit of information.

17 THE CHAIRMAN: But MacLean, it's a timing issue. Because, look, I understand that

18 until you look under the paving stone, you don't know which are the countries.

19 MR MACLEAN: Right, yes.

20 THE CHAIRMAN: I understand that.

21 MR MACLEAN: Good.

22 THE CHAIRMAN: But once you've turned the paving stone over, I do expect, within

23 a reasonable period of time, that you'll identify the countries. It's a timing point. I think

24 it -- certainly well before the exchange of expert reports, the tribunal would expect that

25 information. But what you're saying --

26 MR MACLEAN: (Overspeaking) for disclosure?

1 THE CHAIRMAN: No, you need to get disclosure. I'm not saying you're wrong about  
2 that. All I'm saying at the moment is I do expect to have that information well in  
3 advance of exchange of expert reports. The only question is, when we get to the  
4 directions -- and we haven't done that yet -- that there is something in there that says,  
5 "Yes, you will identify the countries that you are going to include as per your reference  
6 at paragraph 20(b) and 27 of Mr Hunt and Grantham's report, dated  
7 5 December 2025".

8 MR MACLEAN: Fine, and that's not what we understood (overspeaking).

9 THE CHAIRMAN: No, I know. This is a fast-moving thing. It's come as you, as you  
10 say, on very, very short notice.

11 MR MACLEAN: Yesterday.

12 THE CHAIRMAN: I know. It's short notice, but you're both big dinosaurs in this place  
13 and so you can deal with things at very short notice.

14 MR MACLEAN: If he's a T-Rex, I don't know what I am.

15 THE CHAIRMAN: I think that -- I better not say anything, to be honest.

16 MR MACLEAN: No, you better not.

17 THE CHAIRMAN: All I can say is both of you are seasoned campaigners in this  
18 tribunal and you're both highly respected, and it's a delight to have a hearing with you  
19 two because the quality is so much easier. That's why we can do things quickly and  
20 jump from one thing to another.

21 MR MACLEAN: Sir, I don't have a problem. I'm going to argue against that. So we'll  
22 get that in terms of the timetable. All I'm saying is you might find yourself where Hunt  
23 has said -- and I say, I don't know what he's going to say -- "Well, I've looked at the  
24 whole world. I've looked at Europe". Now, if that's what the position is and that's what  
25 you want, sir, that's what we said.

26 THE CHAIRMAN: Yes, but what he may say is, "I've looked at the following 10

1 countries", so he identifies the 10 countries, and he says, "I get absolutely no  
2 assistance from any of those for the following reasons".

3 MR MACLEAN: Yes, he may well.

4 THE CHAIRMAN: So at least we know what the universe is. But on the other hand,  
5 he may say, "I've found two countries that are of assistance", and obviously that's even  
6 more important, to identify those two.

7 MR MACLEAN: I get that.

8 THE CHAIRMAN: That's fine. Okay.

9 (12.32 pm)

10 Ruling on DiD model (submitted to the tribunal for approval)

11 (12.33 pm)

12 THE CHAIRMAN: So I think both of you have come out of that with what you want.

13 Okay, so I can tick that one off.

14 MR HARRIS: Yes, besides the (i). It won't surprise you to know that I prefer to be  
15 called a T-Rex making a boomerang submission, than to be making a silly tit for tat  
16 comment, but my learned friend delivers that line with such panache that I don't take  
17 offence.

18 THE CHAIRMAN: Look, you know, that makes absolutely no difference at all with me.  
19 You know, you can try jury points on other people, you may get somewhere with it, but  
20 not with me.

21

22 Item 2

23 Submissions by MR HARRIS

24 MR HARRIS: The next issue, then, 2. Obviously, you've had an opportunity to read  
25 the 20 or so pages of the --

26 THE CHAIRMAN: Yes, it's very helpful, yes. I now know where they're coming from.

1 It's very helpful.

2 MR HARRIS: We found it very helpful as well.

3 THE CHAIRMAN: Yes.

4 MR HARRIS: Of course, it's relevant to a later part of the hearing, namely directions,  
5 that there is now avowedly going to be a positive case for Royal Mail. That was one  
6 of the issues that --

7 THE CHAIRMAN: A positive case on half, but a negative case on the other half.

8 MR HARRIS: Exactly.

9 THE CHAIRMAN: What they say is the DiD model is never going to be of any  
10 assistance; there's no point them doing it.

11 MR HARRIS: Yes.

12 THE CHAIRMAN: And all they're going to do is fire arrows at whatever you produce,  
13 which they're perfectly entitled to do.

14 MR HARRIS: Exactly. So we're all clear about that.

15 THE CHAIRMAN: That's why, at the CPO stage, the view of the tribunal was that  
16 whilst, of course, you can go down the DiD model, it's not prudent on your side simply  
17 to base your case on the DiD model. You need to have something to back up that in  
18 case the DiD model doesn't work on its own, or it fails completely because there's  
19 a number of scenarios as to the DiD model.

20 We may find it's very, very helpful and it works and we can just follow that, or we may  
21 find that it doesn't help us at all, in which case that's negative. Or we may find it  
22 somewhere in between and it needs to be supplemented. As long as you know what  
23 you're looking for and what we're going to get, the tribunal is happy at this stage. But  
24 we're not going to make a ruling at this stage as to whether or not it's going to work,  
25 because we just don't have enough information.

26 MR HARRIS: Sir, yes, I agree.

1 | There are just two things that I would like to draw your attention to in the  
2 | Hunt-Grantham report, before we turn to what I apprehend will be the longer issue,  
3 | which is, the disputes on the draft list of issues.

4 | THE CHAIRMAN: Oh, yes. That's going to be interesting.

5 | MR HARRIS: Both of these two remarks are designed to be constructive with a view  
6 | to the debate we're about to have on the drafting of the list of issues.

7 | THE CHAIRMAN: Okay, so still on item 2?

8 | MR HARRIS: Still on item 2 from my perspective, yes.

9 | Would you mind just turning back to the Hunt-Grantham joint report? So it was tab 9 --

10 | THE CHAIRMAN: Yes.

11 | MR HARRIS: -- of the file B1.

12 | THE CHAIRMAN: Yes.

13 | MR HARRIS: The principal remark concerns counterfactuals. What you'll have seen  
14 | is that there's a dispute about the extent to which, and the degree to which, Royal Mail  
15 | should be obliged to identify and plead out its counterfactual. We say they should and  
16 | they say either they shouldn't or they can't, or I'm not quite sure what. That's the  
17 | dispute.

18 | Can I just draw your attention, please, to page 365?

19 | THE CHAIRMAN: Well, we will need to know what their counterfactuals are.

20 | MR HARRIS: We say yes.

21 | THE CHAIRMAN: It's probably going to be very similar to what we've just dealt with  
22 | in relation to the comparative countries. But we do need to have clarity, and I doubt  
23 | that Mr MacLean will object to that, he's just saying, "Well, at this stage, it's not ideal  
24 | to have to spell it all out whilst the research is still coming on, and we haven't reviewed  
25 | all the disclosure", but once he's done that, his expert should be in a position to spell  
26 | out what the counterfactuals are.

1 Now, that may mean also that there's going to have to be an amendment to the  
2 pleading, because the pleading is fairly narrow on what the counterfactual is, but I'm  
3 not going to exclude anything on this aspect from Royal Mail; it's going to be very  
4 helpful to know what their case is, and I'm very unlikely to say, further down the line,  
5 "Oh, you can't run this counterfactual".

6 Where you're likely to be is if you're going to run other counterfactuals, make sure that  
7 we all know what they are well before the exchange of expert evidence, and if there  
8 needs to be any amendment to the pleadings, then that needs to be done. But I'm not  
9 going to shut out Royal Mail on the counterfactuals. Yes.

10 MR HARRIS: We don't seek to shut them out.

11 THE CHAIRMAN: Yes.

12 MR HARRIS: But what we do seek is clarity.

13 THE CHAIRMAN: Of course.

14 MR HARRIS: There may be a difference between us, sir, on timings, so let me explain  
15 that. What's absolutely essential is clarity because otherwise neither side can properly  
16 prepare for the case, nor can the tribunal. What we don't have yet is clarity.

17 I won't take you to all the references, but you will recall that, in particular in Mr Hunt's  
18 section of the joint report, the terminology he uses "potential competitive response(s)",  
19 but they then don't identify what those potential competitive responses are on the  
20 counterfactual. That's what needs to be clarified. I'm assuming that that's not going  
21 to be contested, but if it is I'll respond.

22 But there is an issue about timing, and it's this. Well, there are two issues: one is that  
23 the counterfactuals, in my respectful submission, do have to be pleaded so that they're  
24 completely clear on the pleadings. Let me give you an example.

25 THE CHAIRMAN: Well, I've said that already.

26 MR HARRIS: That's great, so that'll be mended.

1 A recent example was when, on the last occasion, we said that in the counterfactual,  
2 Whistl might have expanded into small parcels and unaddressed mail, and one wasn't  
3 pleaded in terms, and you said, "No, that's a counterfactual needs to be pleaded in  
4 terms".

5 But it's relevant that what the tribunal also said was it needs to be pleaded in terms,  
6 so it's gone in red in the amended reply. That's relevant to us because we don't see,  
7 with respect, why Royal Mail, who frankly knows a great deal more about the market  
8 than our client, and what's more, has been engaged in the Whistl litigation, where  
9 many of the relevant counterfactuals must have already been thought about with  
10 a great degree of precision.

11 Indeed, on our reading of the order, Royal Mail was only a matter of a month or two  
12 away from service of the actual final experts' reports that would have dealt with in  
13 detail some of these very same counterfactuals. Against that background, we don't  
14 see why Royal Mail should now not have to plead out its proposed counterfactuals,  
15 but should wait until the end of disclosure.

16 THE CHAIRMAN: Just a point of detail. You've had disclosure from the Whistl  
17 proceedings. Have you had disclosure of the expert reports in those proceedings or  
18 not?

19 MR HARRIS: No, because they weren't served.

20 THE CHAIRMAN: They weren't served?

21 MR HARRIS: They settled shortly before. The two may be related, of course.

22 THE CHAIRMAN: No, but if they weren't served, then they're obviously LPP.

23 MR HARRIS: We agree.

24 THE CHAIRMAN: And I wouldn't expect Royal Mail to waive privilege at this stage.

25 MR HARRIS: No, and we're not asking for that, but I'm making a slightly different  
26 point, which is it's not the case that Royal Mail has been in the market for decades, is

1 the incumbent monopolist, and who has had the benefit of not just any old expert, but  
2 these two same experts who were a matter of months away from actually revealing in  
3 detail the counterfactuals upon which they relied for the questions that arise in this  
4 litigation: namely, what would Whistl have been able to do? What would they have  
5 done? How would Royal Mail have reacted? What would Ofcom have done?  
6 Because that impacts ...

7 All of these things are identical in this case as they would have been in Whistl, had it  
8 preceded. Their thinking must be very advanced. All I'm saying to you now is: in order  
9 to avoid the asymmetry that would arise if Royal Mail is not told that it has to plead out  
10 its counterfactuals now, but can wait till months and months after disclosure, we're  
11 disadvantaged. In circumstances where it doesn't appear to be necessary, and in  
12 circumstances where we've been told, you do have to plead out your counterfactuals,  
13 and we have.

14 My submission is that Royal Mail should be told to identify all of its "potential  
15 competitive response(s)".

16 THE CHAIRMAN: Which paragraph are you looking at?

17 MR HARRIS: Well, it occurs in many, many places, but I was reading from 11(a) on  
18 page 365. That phrase appears many times. "Potential competitive response(s)".

19 THE CHAIRMAN: Yes.

20 MR HARRIS: Just before I show you a couple of other examples of where it recurs,  
21 can I draw your attention to the first line of paragraph 13 on the same page.

22 THE CHAIRMAN: Obviously, there are all sorts of issues that come up in 11(b) as  
23 well, but --

24 MR HARRIS: I was going to come back to it.

25 THE CHAIRMAN: -- we'd be talking about that a bit later.

26 MR HARRIS: I was going to come back to 11(b) because it's similar but slightly

1 different.

2 At the moment I'm just talking about Royal Mail's potential competitive responses.

3 THE CHAIRMAN: Yes. Obviously, we need to know what they are.

4 MR HARRIS: Yes.

5 THE CHAIRMAN: Look, up until now, subject to what MacLean says, the tribunal is  
6 with you on it, and we will need to hear from MacLean as to whether he objects to this  
7 being pleaded out. If he doesn't, it's just a question of timing.

8 The tribunal is not keen to have something as important as this not pleaded and no  
9 clarity, well before the exchange of expert evidence. If the work's going to be done  
10 and they're going to identify these counterfactuals and what they mean at 11(a), you're  
11 going to find out anyway. But it's much better, given its importance, that the pleading  
12 is in the right state, and that you know exactly what you're going to meet. Because it's  
13 not a five-minute job, going through all this, if you want to be able to put evidence in  
14 response.

15 The last thing you want to happen is that they serve a report, and then you've got to  
16 serve your reply to that within whatever the period is. And you're starting from the first  
17 time, at first base. So we want that. I think it's probably better -- let's just to hear  
18 from -- before you finish.

19 MR HARRIS: May I just make a more practical point that bears directly upon the  
20 question of timing? This tribunal has made it very clear, and we completely agree,  
21 that disclosure proceeds by reference to the pleadings. That was one of the reasons  
22 that was given for us adding in "read and unaddressed mail" in our reply.

23 THE CHAIRMAN: That was, yes.

24 MR HARRIS: Of course, we're in the process of disclosure, but we're by no means  
25 finished. One of the reasons why we respectfully contend that Royal Mail should be  
26 obliged, in relatively short order, to set out that which frankly it must already know:

1 | what the key potential competitive responses of itself would have been, is because  
2 | that may bear upon what we can ask for or what we'll get in disclosure.

3 | It won't be satisfactory for us only to get that pleading after disclosure, because then  
4 | it may lead to more disclosure. My respectful contention is there should be a relatively  
5 | short period in which these potential competitive responses are pleaded out, then the  
6 | disclosure carries on and we're going to talk about the timing.

7 | Then of course after disclosure, it won't just be Royal Mail that might want then to  
8 | amend or update its counterfactual responses; it might be us, too. And we'll both do  
9 | it. But what won't be good enough is to leave it until too late in the process for the  
10 | reasons that I've given.

11 | THE CHAIRMAN: There's a number of ways to deal with this, but let's see what  
12 | MacLean's got to say, and then we'll come to a landing on it.

13 | Submissions by MR MACLEAN

14 | MR MACLEAN: It's the timing issue.

15 | THE CHAIRMAN: Yes, I would have thought so. Yes.

16 | MR MACLEAN: The complaint that it'd be too late unless it's done imminently is simply  
17 | overblown in the circumstances of this case. I know the tribunal has set down  
18 | directions for trial. That trial is going to be in 2028. Disclosure --

19 | THE CHAIRMAN: That far away, yes.

20 | MR MACLEAN: Disclosure should be taking place by February. My friend says now  
21 | it's got to be in June.

22 | THE CHAIRMAN: MacLean, isn't that a bit optimistic about disclosure, because you  
23 | haven't completed the Redfern schedule.

24 | MR MACLEAN: Yes, well, it may be optimistic. We'll come to that.

25 | THE CHAIRMAN: Yes.

26 | MR MACLEAN: All I'm saying is that there is no need, other than a purely tactical and

1 forensic reason, to put the fire under our feet at this stage, in advance of disclosure,  
2 in relation to pleading out counterfactuals, which may or may not change in the course  
3 of following disclosure. Why are we going to have two bites of the cherry when one  
4 will do?

5 THE CHAIRMAN: Can I make a suggestion and see if you can live with it?

6 MR MACLEAN: Yes.

7 THE CHAIRMAN: That by some date in February you set out a letter as to the  
8 counterfactuals that you're contemplating, and that when it comes to amending it and  
9 pleading it out, you do it once we've completed disclosure. That way, you're not  
10 prejudiced, because what you'll be saying is, "This is what we're minded to do at the  
11 moment", and so you're not bound in that sense, and everyone's got enough notice.  
12 And then you plead it out in the way you've suggested at the right time.

13 MR MACLEAN: I mean, we would prefer a date in March for that, in order to do this  
14 properly. So that (Overspeaking).

15 THE CHAIRMAN: That's all right, that's absolutely fine.

16 MR MACLEAN: That's what I'm told from those sitting behind me.

17 THE CHAIRMAN: Can I just give a quick ruling on this and then --

18 MR MACLEAN: Yes.

19 THE CHAIRMAN: Because it's a very short point.

20 MR HARRIS: May I just make one point though. We're content with that on the  
21 understanding, though, that the letter can be relied upon as for requests for disclosure,  
22 we may look at it --

23 THE CHAIRMAN: Of course you can. Of course it would be part of that. I'm sure  
24 you've got no problem with that.

25 (12.47 pm)

26 Ruling on item 2 (submitted to the tribunal for approval)

1 (12.49 pm)

2

3 Expert evidence

4 Submissions by MR HARRIS

5 THE CHAIRMAN: We've dealt with that. Is there anything else that arises from  
6 Mr Hunt and Grantham?

7 MR HARRIS: There is the second point that I wanted to -- whilst it's open, just --

8 THE CHAIRMAN: So we're still on (a)(ii)?

9 MR HARRIS: (a)(ii). The first one that you've just dealt with shortens one of the issues  
10 under item (iii).

11 THE CHAIRMAN: Okay.

12 MR HARRIS: That's good news. The reason I raise this next point is for the same  
13 purpose.

14 THE CHAIRMAN: So if we finish this, and we just do the issues for ...

15 MR HARRIS: The list of issues doubtless will --

16 THE CHAIRMAN: -- the afternoon.

17 MR HARRIS: Yes, after the lunch adjournment.

18 It is this: essentially, as I understand the position having read Hunt and Grantham  
19 carefully and understanding what our own experts propose to do, namely forensic  
20 accountant and competition economists, is they want to be able to opine on their areas  
21 of expertise as to whether, based upon that perspective, it's likely that something  
22 would have happened or not happened, or how far it would have gone in the  
23 counterfactual. So very broadly.

24 This is, in my experience, common. That doesn't mean to say that the experts on  
25 either side are trespassing upon the territory of the tribunal, who ultimately is the arbiter  
26 of whether or not something would, as a matter of fact, have happened in

1 a counterfactual. To put that another way: you decide, in your judgment, what would  
2 have happened as a matter of fact in a counterfactual, to the extent you need to, but  
3 you're assisted in your determination of that issue by expert opinions from, say,  
4 a forensic accountant as to what the finances look like, therefore, how likely it is that  
5 something would have happened.

6 You'd be assisted by a view from a competition economist as to what the economics  
7 look like, what the financial or economic incentives are, so as to assist you in coming  
8 to this view on the counterfactual.

9 Now, as I understand the position, that's what we want to do with our two experts, but  
10 that's also exactly what Royal Mail wants to do with its two experts. That's why, can  
11 I just show you one or two things before the short adjournment?

12 THE CHAIRMAN: We're coming to this in a bit more detail under the list of issues, but  
13 don't assume necessarily that that's accepted, okay, for either of you.

14 MR HARRIS: Okay.

15 THE CHAIRMAN: Because there is a real issue here as to the extent to which  
16 judgment calls on, let's say -- you can reach conclusions as this is the situation. But  
17 what may happen as a result of that may be something for the tribunal, not for the  
18 experts.

19 For example, I don't know which side it is, but one of you is saying trying to predict  
20 what Ofcom would have done, and so the simple point on that is: we're very happy to  
21 be told what the options are, though we could probably figure out that for ourselves.

22 What I'm not sure we're going to be assisted by is anyone's views -- I don't mean this  
23 unkindly to anyone -- as to how likely any of those Ofcom responses would have been.

24 Because that really is a matter for us. And theoretically, either party could serve  
25 a witness summons from the relevant person from Ofcom, but having it from the  
26 experts, I'm not quite sure we're going to be greatly assisted.

1 MR HARRIS: Sir, two comments and then we may be at the short adjournment.

2 THE CHAIRMAN: Yes.

3 MR HARRIS: The first of all, it may seem trite, but --

4 THE CHAIRMAN: The devil is in the detail. That's why when we get to the list of  
5 issues, that's probably the best time to address these, because we'll go through them  
6 one by one.

7 MR HARRIS: It may well be.

8 THE CHAIRMAN: Yes.

9 MR HARRIS: But what we're keen to ensure, and this, I hope, is common ground, that  
10 if the tribunal would not be assisted from their expert perspective of either type of  
11 expert on a question that it has to determine, then neither party's expert gets to  
12 address that.

13 THE CHAIRMAN: You're 100 per cent right. I'm sure Mr MacLean agrees with that.

14 Submissions by MR MACLEAN

15 MR MACLEAN: I do agree, obviously. I do agree, obviously. But as you rightly say,  
16 sir, the devil is in the detail and we're going to look at that on the issues.

17 THE CHAIRMAN: We'll look at in the afternoon. We'll just go through them one by  
18 one, and then we can say which ones we think we're going to be assisted by and not  
19 assisted by. At the end of the day, the beauty of the docket system is that this case is  
20 our responsibility; we have our own views as to what we're going to be helped by or  
21 not helped by, and hopefully that if we say we don't think we're going to be assisted  
22 by expert evidence on something, that's the end of it, subject to any appeal.

23 I'm quite strict on expert evidence, as you know, as to how admissible it is. And in this  
24 tribunal, there's been a lot of evidence, in many cases, costing vast sums of money,  
25 which have at the end of the day been of absolutely no assistance to the tribunal  
26 resolving the issues in the case.

1 MR MACLEAN: The recent practice direction --

2 THE CHAIRMAN: Yes.

3 MR MACLEAN: -- emphasises that, but it would come to no surprise to you, sir, or  
4 anyone else who has operated in these courts and in the commercial court, that that  
5 was always the position: the court only gives permission for expert evidence that is  
6 strictly defined by reference to issues and is necessary.

7 THE CHAIRMAN: But, MacLean, you've been in this job long enough. You've seen  
8 that there's been, like this, movement. You go through periods where expert evidence  
9 is just let in because someone asked for it, and then other periods where they're more  
10 strict.

11 But I think when you look at the tribunal and the recent practice direction, we're going  
12 on a downward trend, rather than one of those areas where it was like a sort of free  
13 for all, and the judge saying, "Well, we'll let it in; it's going to be de bene esse".

14 MR MACLEAN: It's better for the tribunal.

15 THE CHAIRMAN: Yes.

16 MR MACLEAN: It's better for the ends of justice, and it's better for the parties that that  
17 is the approach the tribunal takes. I entirely agree.

18 (12.55 pm)

19 Ruling on expert evidence (submitted to the tribunal for approval)

20 (12.57 pm)

21 MR MACLEAN: We are always saying that.

22 THE CHAIRMAN: I don't know, but it always costs a lot of money. I'm not sure  
23 whether you mean to say --

24 MR MACLEAN: We're all concerned that the tribunal is not overburdened with this  
25 stuff.

26 THE CHAIRMAN: I'd just like everything simple. If it's simple, then I can understand

1 it. So we'll come back at 2.00 pm. If the juniors can work on timings and stuff, insofar  
2 as you can agree directions on the timings. We will finish today with everything  
3 resolved.

4 (12.57 pm)

5 (The short adjournment)

6 (2.06 pm)

7 THE CHAIRMAN: On the list of issues, we've considered -- the written submissions  
8 are already filed, and I think probably the best way to do it is that we just go through it  
9 item by item, hear from you, hear from MacLean, and if I need to hear from you again,  
10 I'll come back to you and then we'll just say where we are. Mr MacLean, are you happy  
11 with that approach?

12 MR MACLEAN: I'm happy with it. You'll find, I suspect, and as we deal with a number  
13 of points of principle, that the same point applies throughout.

14 THE CHAIRMAN: Yes, probably. Yes. I think that's right.

15 Mr Harris, so if you take the lead. Let's just do it one by one. So if we look at number 1.

16

17 Updated composite list of issues

18 Submissions by MR HARRIS

19 MR HARRIS: Yes, so this is tab 10, draft updated composite list of issues, item 2.

20 THE CHAIRMAN: But my one, it says issues -- let's hope I've got the right one. It  
21 says:

22 "The class representative's theory of harm including [that's one wording] setting out  
23 conceptually [that's another wording]." [as read]

24 Have I got the right version?

25 MR HARRIS: No, there was one -- you should have an updated one that's dated  
26 10 December, which should be your page 379.

1 THE CHAIRMAN: Okay, so that's the third -- okay. Let me have a look at -- which  
2 one are you looking at?

3 MR HARRIS: It's tab 10, it's page 379 of bundle B1.

4 THE CHAIRMAN: All right, I'll just forget about the old one.

5 MR HARRIS: Yes, it got updated because there was some more agreement between  
6 (overspeaking).

7 THE CHAIRMAN: No, that's absolutely fine. No problem. Yes, so let me look at that.  
8 (Pause)

9 Okay. 1 is where we would have got to anyway, so that's fine.

10 MR HARRIS: So that one's agreed and the tribunal is content.

11 THE CHAIRMAN: Yes.

12 MR HARRIS: Item 2 is where the first extant disagreement arises. I might as well just  
13 take them in order, then. I'm not sure it really matters, "likely range of" or "potential".  
14 So I don't really have anything to say about that.

15 THE CHAIRMAN: Well, Mr MacLean, do you want to say anything about that?

16 MR MACLEAN: Yes. Well, I mean, we've had, to an extent, the debate about likely  
17 or not likely.

18 THE CHAIRMAN: I know.

19 MR MACLEAN: We suggest that "potential" is a better word. It doesn't trespass on  
20 the ultimate findings of the --

21 THE CHAIRMAN: Yes, I was inclined to take out the word "likely", because you want  
22 the range of potential, and then we are where we are.

23 MR MACLEAN: Yes, exactly.

24 THE CHAIRMAN: Okay, that's fine.

25 MR HARRIS: I'm happy with that. Thank you very much. The next one is, "in a lawful  
26 counterfactual", and that one is disputed. We're a bit confused because it should be,

1 | if it's not, common ground that you can only have a lawful counterfactual. What we're  
2 | keen to make sure is that the issue of whether there is a dispute between the parties  
3 | on lawfulness is crystallised, including on the pleadings, so that the tribunal knows.  
4 | Because if we're just arguing about whether a counterfactual would have happened,  
5 | that's one thing, and that can be what happens at trial. But if, in addition, we're arguing  
6 | about the lawfulness of that counterfactual, then that's a second issue that has to be  
7 | decided by the tribunal at trial. This already arises --

8 | THE CHAIRMAN: No, I understand what the point is.

9 | MR HARRIS: -- on the pleadings.

10 | THE CHAIRMAN: But on this, what the claim says is that he wants to have all the  
11 | counterfactuals in and he's entitled to have that and we've discussed about them being  
12 | particularised or whatever already.

13 | But what he doesn't want is it to be said that he can only give expert evidence on lawful  
14 | counterfactuals, and there's a dispute as to whether or not something is lawful or not,  
15 | and then there's a dispute as to whether or not that part of the expert report is  
16 | admissible.

17 | Both of you are right in a sense, but it's a question how do you sort of conceptualise  
18 | that in writing, where we all know it has to be lawful, but there may be a prior issue as  
19 | to whether or not it is lawful.

20 | MR HARRIS: Yes.

21 | THE CHAIRMAN: And so how do you want to deal with that? Yes?

22 | MR HARRIS: We're not trying to preclude Mr MacLean and his experts from putting  
23 | forward the counterfactuals in pleading, as we discussed before them.

24 | THE CHAIRMAN: Yes.

25 | MR HARRIS: We're not trying to say that. What we're trying to say is that once they're  
26 | there in the pleading, we might say, as we've already done with the one I'm about to

1 show you, "Ah, you couldn't have done that one, because that would have been  
2 unlawful".

3 THE CHAIRMAN: And you'd be entitled to say that.

4 MR HARRIS: Yes.

5 THE CHAIRMAN: It's a question of how we get to -- I understand what you're both  
6 trying to do. We both understand that. But it's just, really at this stage, a question of  
7 wording, because there's no doubt that MacLean's going to be entitled and you're  
8 going to be entitled to put a number of counterfactuals as possible counterfactuals,  
9 and that's all going to be pleaded out for the reasons we've given earlier.

10 But within that, there may be counterfactuals which one of you says the other one's  
11 trying to rely on one that's not lawful. So where does it add anything here if we include  
12 the word "lawful"? It may be that the simplest thing is that we take out the word "lawful"  
13 and I say something about this now and then that would be in the ruling, that everyone  
14 understands where we are.

15 MR HARRIS: I'm content with that, sir. It helps that it's been established now that  
16 Royal Mail needs to, at the right juncture, plead out the counterfactual, because then  
17 it will be incumbent upon us at the right juncture to say, "Well, we deny it on the facts  
18 or the expert evidence, but by the way, we also say it's unlawful, so you can't succeed  
19 on it at trial in any event", like we've done in paragraph 19 of our reply.

20 THE CHAIRMAN: Yes, okay. Let me quickly deal with that.

21 (2.12 pm)

22 Ruling on updated composite list of issues (submitted to the tribunal for approval)

23 (2.13 pm)

24 MR HARRIS: I'm happy with that.

25 THE CHAIRMAN: Thank you very much.

26 MR HARRIS: Thank you very much.

1 THE CHAIRMAN: Yes.

2

3 Discussion on the wording of the Composite List of Issues for Expert Evidence

4 Submissions by MR HARRIS

5 MR HARRIS: The next issue on the text is the recurring dispute about the words

6 "and/or entry by other market entrants, if applicable". This has, really, only two limbs

7 to my submission.

8 THE CHAIRMAN: Yes.

9 MR HARRIS: Can I draw your attention, please, to the defence, which is core bundle,

10 tab 5.

11 THE CHAIRMAN: My defence is -- no, it wasn't there, so I've asked someone to print

12 it out. (Pause)

13 So it should be, what, tab 3?

14 MR HARRIS: It should be tab 5, I believe.

15 THE CHAIRMAN: Tab 5, okay. We'll put it in. (Pause)

16 I'm going to leave it loose because I've got rival numbering, so let me just put it back.

17 Okay, which paragraph of the defence?

18 MR HARRIS: I'm going to take you in just a moment to 66.1. That's at the bottom of

19 page 652 of the defence. (Pause)

20 THE CHAIRMAN: 66.1, yes?

21 MR HARRIS: Yes. Just before you, I invite you to re-read that, can I preface it with

22 this remark: we don't regard it as that controversial in a competition case that's looking

23 at the effects of what has already been found to be an infringement. The competition

24 economists, at least, will want to be analysing the question of not only who was an

25 entrant, Whistl, albeit for a short period of time, but what are the implications for the

26 competition economics of potential other entrants. We say we don't regard that as

1 controversial, and I can show you in due course, that the Ofcom decision is replete  
2 with references to not just Whistl being an actual or potential competitor, but to other  
3 actual or potential competitors.

4 So it's against that background that we say this is entirely orthodox, that in  
5 a competition law analysis, one would be looking at not just actual entrants, but  
6 potential entrants to see how the market would evolve.

7 THE CHAIRMAN: On that, the one that's been identified, and is the heart of the case,  
8 is Whistl, okay? And they were allegedly deterred from continuing their rollout.

9 I fully accept that there may be other potential competitors, but what will need to be  
10 identified is who they are. If it's to some sort of woolly thing, that someone may have  
11 come out from the woodwork, but when you look at everything I've read so far, it was  
12 Whistl; they disappeared, they never came back, I've seen no evidence of anyone else  
13 coming in to provide that type of quasi-universal service. All I'm saying is, is that if  
14 you've got other potential competitors, we're not going to stop you from arguing that,  
15 but what MacLean probably wants is clarity as to who they are, and if we're going to  
16 have another go at amending the pleadings, which we have -- we've already identified  
17 two topics where there may be amendments to the pleadings. When that happens, if  
18 you've got any other potential competitors at that stage, you identify them.

19 Is that okay? Mr MacLean, is that encapsulating what you really want to say?

20 MR MACLEAN: Not really, no.

21 THE CHAIRMAN: It's not. Okay, tell me what, because at the moment --

22 MR HARRIS: Shall I show you the pleadings and make my submissions first?

23 THE CHAIRMAN: Well, let's hear from MacLean, and then we'll just see where we  
24 are, and then we can go back to the pleadings.

25 Submissions by MR MACLEAN

26 MR MACLEAN: It's very interesting that my learned friend started with our defence.

1 Normally, you would expect, if this was an issue, he'd take you to where he relies on  
2 it in his pleaded case. He doesn't have a pleaded case, that there were actual or  
3 potential other market entrants; it's not his case. And he has, therefore, to show you  
4 something in our defence, which does not, as he suggests in his skeleton argument,  
5 give rise to the argument that there were others potentially waiting in the wings. And  
6 even more significant, what he doesn't show you is what his own expert says.

7 THE CHAIRMAN: Let me just look at it. At the moment, the only one that I've read --

8 MR MACLEAN: Yes.

9 THE CHAIRMAN: -- that's been identified in the pleadings, is Whistl.

10 MR MACLEAN: Correct.

11 THE CHAIRMAN: If there are any others, I'm not going to shut them out conclusively  
12 at this stage. But what they're going to have to do, if there are others, they're going to  
13 have to plead them, because it doesn't feed into their actual pleading, and there are  
14 all sorts of points that can be made about other potential entrants, which, quite frankly,  
15 for both of you, are potentially two-edged. You're clever enough to know that, and so  
16 if either of you are going to run other potential entrants, we need to know who they  
17 are. The question is: at what stage are we going to get to that? But you're perfectly  
18 entitled at the moment to say: no one else has been identified, and unless until  
19 someone's identified, it's not really a live issue, but we can see it can easily be a live  
20 issue, but if it is going to be a live issue, they've got to identify who they are.

21 MR MACLEAN: And the list of issues at this stage should not, therefore, include these  
22 other entrants, which are not pleaded. Can I just tell you what Mr Williams said in his  
23 first report?

24 THE CHAIRMAN: Yes, tell me.

25 MR MACLEAN: Under the heading "Counterfactual", paragraph 6.3b, file B1.

26 THE CHAIRMAN: Just read it.

1 MR MACLEAN: I'll read it to you:

2 "In this sub-section, I describe the likely evolution of competition over the Relevant  
3 Period, had the infringement never taken place."

4 That's where we are.

5 "For the purposes of this analysis, I have assumed that, in the Counterfactual, Whistl  
6 would be the sole entrant and competitor to Royal Mail Bulk Mail Delivery Services."

7 So that's the starting point. That's consistent with my learned friend's pleadings, and  
8 he doesn't get the existence of other entrants out of our pleadings or anywhere else.

9 So this case is about Whistl, as you rightly identified.

10 Now, as you also rightly say, well, if you're going to come up with somebody else  
11 beyond Whistl, you're going to have to tell us who that is. And it's just that, at this  
12 stage, the list of issues doesn't provide for what isn't his pleaded case and what isn't  
13 his own expert's case. That's as simple as that. (Pause)

14 THE CHAIRMAN: You see, MacLean, if you look at 2, where Harris says, "and/or  
15 entry by any other market entrants", it should be identified by either party. And if that's  
16 right, then I don't need to keep amending the list of issues for experts. But until any  
17 have been identified, then you've got no problem. Once they've been identified, that's  
18 fine. We just need to know who they are.

19 MR MACLEAN: And when they can be identified.

20 THE CHAIRMAN: And when they can be identified. So look, Harris, if you're happy,  
21 as long as you've made that clear -- so it's and/or entry by other market entrants  
22 identified by either party -- and then we'll have an argument when with Mr MacLean,  
23 or you'll have an argument with Mr MacLean, when we'll look at the detail of directions  
24 in a minute -- I hope it's in a minute -- that we will thrash this one out. But I think we've  
25 got to a pleading. We've got to a position where everyone is going to be able to argue  
26 what they want on this.

1 MR HARRIS: Thank you. It's important not to lose sight, as I know you haven't, that  
2 the following words after the parentheses, to be determined by reference to the parties  
3 pleaded cases, we will, when we identify -- if there are any from our perspective -- we  
4 will plead them. It's an exact parallel --

5 THE CHAIRMAN: identified by other party, we're going to put that, in because they  
6 may want to --

7 MR HARRIS: They can plead them too, no problem. So, in other words, it's an exact  
8 parallel to the debate we had before the lunch adjournment, on the potential  
9 counterfactual responses. It's acceptable now for Royal Mail to proceed, everyone  
10 knowing that there are some potential but yet unparticularised competitive responses,  
11 and they will identify them and then plead them, exactly the same for us. We say there  
12 might be some other market entrants, and when we've been through the disclosure,  
13 we'll have a better idea, and then we'll plead them.

14 THE CHAIRMAN: Okay, can I just explain where I'm from? Because I may have been  
15 a bit too cryptic and maybe too quick.

16 MR MACLEAN: Yes.

17 THE CHAIRMAN: You can have companies A, B, and C, as potential market entrants.  
18 Your case may be, "Yes, these people are potential market entrants, but they never  
19 entered, and they didn't enter, because it's never going to be financially viable". And  
20 so I think --

21 MR MACLEAN: I do say that already in that pleading.

22 THE CHAIRMAN: No, but what I'm trying to say --

23 MR MACLEAN: (Overspeaking) other in the market didn't do it either.

24 THE CHAIRMAN: I know, and that's why I'm saying that actually, either party might  
25 want to be identifying other potential market entrants, then for saying yes, their  
26 potential, they would have come in, were it not for the Royal Mail doing something that

1 breaches competition law. Or you will say, "No, I positively rely on X, Y and Z as  
2 potential people, but they didn't come in".

3 MR MACLEAN: We do that already, sir.

4 THE CHAIRMAN: I know, but have you identified potential --

5 MR MACLEAN: Yes, we say, at no point, since it became possible to do so, has any  
6 other access operator --

7 THE CHAIRMAN: No, that's not the same point.

8 MR MACLEAN: And that includes UK Mail.

9 THE CHAIRMAN: Okay, so you've identified --

10 MR MACLEAN: UK Mail.

11 THE CHAIRMAN: So that's one of yours, as a possible market entrant. So what we  
12 want to come to is to have an understanding, as to who both of you say are the  
13 potential market entrants, because there will be, or there may well be, at trial,  
14 a relevant part of the factors coming into the decision of the tribunal, as to who these  
15 other people are and why they didn't come in. Now, I understand what your case is,  
16 but for me, all I want to know is: what that list is.

17 MR MACLEAN: Right. Well, you've got our list.

18 THE CHAIRMAN: Well, maybe you'll come up with others. But we'll need to come to  
19 a stage where we all know what the potential ones are that both parties can address,  
20 because --

21 MR MACLEAN: That is going to come when you direct what the timing of this is going  
22 to be --

23 THE CHAIRMAN: Exactly.

24 MR MACLEAN: -- and what the source for arguments has got to be, source for their  
25 gander, in terms of that sort of --

26 THE CHAIRMAN: I'm not sure if they are a gander, but yes, I understand what you're

1 saying.

2 MR MACLEAN: Dinosaur: source for the T-Rex.

3 THE CHAIRMAN: Exactly, okay.

4 Yes, Mr Harris.

5 MR HARRIS: Very good.

6 THE CHAIRMAN: So that's clear, what we're doing.

7 MR HARRIS: I'm sure we can tidy up.

8 THE CHAIRMAN: Yes, good.

9 Submissions by MR HARRIS

10 MR HARRIS: I think that probably actually takes care of -- we've already dealt with

11 2A. The reason that we had put in red, and didn't like the blue, was because we have

12 identified a pleaded counterfactual by the defendant, as a change to the zonal tilt, but

13 we hadn't identified any others.

14 THE CHAIRMAN: Yes, exactly.

15 MR HARRIS: So that's really been dealt with now.

16 THE CHAIRMAN: It has been.

17 MR HARRIS: And I think, "B", likewise being dealt with. "D" -- there's one other issue.

18 So we dealt with the bit that's, I think --

19 THE CHAIRMAN: So are you clear as to what A and B should say now?

20 MR HARRIS: Well, I am sure that we can work it out, yes.

21 THE CHAIRMAN: MacLean, are you sure the juniors can work that out?

22 MR MACLEAN: Well, in light of the indication from the Chair, it shouldn't be restricted

23 in the way in which it is restricted in red, and it should be such counterfactual

24 responses. If so, and for what period? Because that's already been determined,

25 i.e. with reference to the other counterfactuals that we're going to be allowed to put

26 forward in March, and thereafter. So it can't be restricted, in the way in which it

1 suggests --

2 MR HARRIS: No, that's right. I agree with that.

3 MR MACLEAN: Good.

4 MR HARRIS: Yes, that's why I thought we'd already agreed that.

5 THE CHAIRMAN: I think it's going to be fine. But sometimes you think everything's

6 agreed, and then you go away, and then it's not. But if you both feel that the juniors

7 are going to be able to agree, then I don't need to spend any time in giving a ruling on

8 this.

9 MR MACLEAN: I'm sorry. Can we be picky?

10 THE CHAIRMAN: You can be picky, that's fine.

11 MR MACLEAN: Can we determine that, for example, in blue, in 2, in the chapeau, is

12 okay?

13 MR HARRIS: Well, I think it is now, because what we've determined is, it's

14 counterfactual responses to be identified in due course, in the manner that you --

15 THE CHAIRMAN: Yes, but you've got to add that in, identified in whatever.

16 MR HARRIS: Yes, we will do that.

17 THE CHAIRMAN: Add in the wording of the order.

18 MR HARRIS: It will be added in, in March, and then by pleading later on.

19 THE CHAIRMAN: But it's got to all tie in to whatever order we're going to say, because

20 the current wording on its own, we need to make it clear, it's going to be the pleaded

21 counterfactual --

22 MR HARRIS: Yes.

23 THE CHAIRMAN: -- or identified counterfactuals.

24 MR HARRIS: Yes.

25 THE CHAIRMAN: Okay, that's fine. Let's move on.

26 MR HARRIS: So I think it follows that "D" should have in the wording in blue and in

1 red, because the blue wording was Royal Mail wanted to restrain it to effects upon  
2 defendant and Whistl, but it follows that, "if in due course we're going to be pleading  
3 out", or they are other market entrants, then those words need to go in "D", for today's  
4 purposes.

5 THE CHAIRMAN: Yes, which will be identified, other identified market entrants.

6 MR HARRIS: Agreed. And then unless --

7 THE CHAIRMAN: Other market entrants identified by the parties, and then we'll come  
8 to how that comes in the order.

9 Yes, next one.

10 MR HARRIS: May I just take a ... (Pause)

11 Right. So the issue as regards (f), I think is really being taken care of by the decision  
12 on counterfactuals. Where it has the words "would have involved changes to the zonal  
13 tilt", at the right moment in time, that has to be spelled out.

14 THE CHAIRMAN: I understand.

15 MR HARRIS: You can't just have nebulous at large, possible -- you know. The  
16 wording is not so much a problem now that we've had this discussion about  
17 counterfactuals.

18 THE CHAIRMAN: I think you're right.

19 MR HARRIS: Because if they spell out what the changes are to the -- we apprehend  
20 at the moment there's one type of change to the zonal tilt, but when we got this word  
21 and we thought, "Oh, maybe the Royal Mail is thinking of different types, two, three,  
22 four different types". Yes, so long as --

23 THE CHAIRMAN: We need to know what they are, exactly.

24 Yes.

25 MR HARRIS: I think in 4, the opening wording will be -- well, this engages the debate  
26 about "is likely to have been", because those words are key to whether you begin with

1 the words "what the", or "the", because of the grammatical construction of the  
2 sentence.

3 THE CHAIRMAN: Okay.

4 MR HARRIS: Mr MacLean wants to take out "what the", and we want to keep it in, but  
5 this is obviously the decision point.

6 THE CHAIRMAN: Where are we?

7 MR HARRIS: 381, paragraph 4, under the heading, "Issues for forensic accounting  
8 expert evidence".

9 THE CHAIRMAN: I've got that, "Issues for forensic accounting evidence". Which word  
10 are we looking ...

11 MR HARRIS: So the rival contentions are:

12 Mr MacLean wants the sentence to read:

13 "The defendant's potential competitive responses, absent the infringing price  
14 differential, to actual or potential expansion by Whistl."

15 Then he goes straight on to (b) over the page. So his wording is what's in black, plus  
16 the two words in blue. What we have suggested is the wording in red, but you can of  
17 course cross out the words, now, "in a lawful counterfactual", because we've already  
18 dealt with that. In the third line, you can add in the --

19 THE CHAIRMAN: That's an issue for the tribunal which we're going to have to rule on  
20 conclusively. I'm happy to follow MacLean's wording on that, because that seems to  
21 accord with what I said earlier, but I think we all know where the dividing line is on that.  
22 The risk is that what one wants to look at is the experts to identify the potential  
23 commercial responses, but then the evaluative decision on what those commercial  
24 responses would have been may be a matter for the tribunal. I'm not going to be too  
25 prescriptive on this.

26 MR HARRIS: Well --

1 THE CHAIRMAN: What the experts can do is they can set out what the potential  
2 commercial responses are, and explain why they think that they are real potential  
3 responses. Whether they should go further and sort of do an evaluative decision on  
4 how likely one is or not; I'm not sure if that's going to really help us. But I do think that  
5 they need to say what they are: what are the potential ones? And why they say that  
6 they are viable or credible ones, because we don't want incredible ones. It's a question  
7 of how deep you go into it and how the expert can try and avoid trespassing into what  
8 could be one of the ultimate issues for the tribunal.

9 MR HARRIS: Therein lies exactly the rub, sir. We agree with everything you've just  
10 said --

11 THE CHAIRMAN: It's on the transcript, now.

12 MR HARRIS: -- provided both parties' experts are proceeding in the same way. If the  
13 parties' experts are setting out what they think on the facts is a candidate, and then  
14 they are addressing from their expert point of view whether it's viable or credible, and  
15 stopping there, no problem.

16 That's provided both parties' sets of experts are doing exactly the same thing and not  
17 going further. What we had thought gave rise to considerable confusion was some of  
18 the language employed in the Hunt-Grantham joint report. Can I give you a couple of  
19 examples?

20 THE CHAIRMAN: Not really.

21 MR HARRIS: Okay.

22 THE CHAIRMAN: Because I think as long as MacLean's happy with what I've just  
23 said, then we don't need to --

24 MR MACLEAN: Entirely happy. We don't need to get into debate as to why they had  
25 a misapprehension, it's not what we --

26 THE CHAIRMAN: I agree, we don't need to. Yes. That's fine. Okay. It's clear on the

1 transcript what we've done. I'll try and reflect in the wording of the ruling, but I think  
2 I know what is required.

3 MR HARRIS: We say, excuse me, we say, under 4, that amongst the wording to be  
4 retained in red is by reference to the parties' pleaded cases, because that's important.

5 THE CHAIRMAN: No, that's fine.

6 MR HARRIS: Unless it's taken as read throughout, then it should remain here for.

7 THE CHAIRMAN: That's fine, you can put that in there. We're going along with the  
8 wording in blue, we're taking out "what the" on the first line. We're leaving out the  
9 lawful bit. (Pause)

10 And then "unlikely", we put "may have".

11 MR HARRIS: And I think we need the words "other market entrants", along whatever  
12 the four -- as identified.

13 THE CHAIRMAN: Yes, we do. Yes, that's fine. Yes, okay.

14 Next one.

15 MR HARRIS: Yes. Good. I think we're making good progress. About (a), I think  
16 (a) comes out, doesn't it?

17 MR MACLEAN: Yes.

18 THE CHAIRMAN: Yes.

19 MR HARRIS: Okay, that's it. Just to confer, I'm told no.

20 THE CHAIRMAN: No, but the experts are going to cover that, so you leave (a) in, it's  
21 just not universal.

22 MR HARRIS: I think it's --

23 I think it's the words, "as a matter of fact", on the top of the next page.

24 THE CHAIRMAN: No, we're going to be very careful about "as a matter of fact".

25 MR MACLEAN: We also would have, "as a matter of fact", that's asking pre-eminently.

26 THE CHAIRMAN: We've changed some of the wording earlier, so "may", not "likely"

1 be".

2 MR MACLEAN: Well, this was an indication and a recognition that this question was  
3 a matter of fact, an issue of fact. That's the objection we took.

4 THE CHAIRMAN: Well, there's more than one objection.

5 MR MACLEAN: Yes, but that's a specific objection to this subparagraph on the basis  
6 that it recognises it was a question of fact, as indeed it does, as currently expressed.

7 THE CHAIRMAN: Yes, but I've said we take out "as a question of fact".

8 MR HARRIS: So we delete the words "as a matter of fact", and we replace the words,  
9 "would have" to "may".

10 MR MACLEAN: Oh, so you're saying "may have". Okay.

11 THE CHAIRMAN: Yes. That's where we've dealt with it.

12 MR MACLEAN: I was misunderstanding that the "may have" came in there rather  
13 than earlier on.

14 THE CHAIRMAN: It comes earlier on.

15 MR HARRIS: It comes in earlier and there. Thank you.

16 THE CHAIRMAN: I know your junior's a bit worried about it. It'll be fine. Don't worry.

17 MR HARRIS: Yes.

18 THE CHAIRMAN: Yes. Next one.

19 MR HARRIS: Item 6 is a different type of issue.

20 THE CHAIRMAN: Are we going to hear from the juniors at all, today?

21 MR HARRIS: Absolutely.

22 THE CHAIRMAN: It's always nice to hear from the juniors rather than the dinosaurs.

23 MR MACLEAN: No.

24 THE CHAIRMAN: No? Okay.

25 MR HARRIS: Can I offer them the floor on a --

26 THE CHAIRMAN: No, but they can help on the timetable or something like that.

1 MR MACLEAN: Yes, absolutely.

2 THE CHAIRMAN: Yes. Okay, that's good.

3 No, I'm serious. I'm trying to encourage the juniors.

4 MR MACLEAN: I agree. If we're having disclosure debates, it would certainly be over  
5 to my learned friends.

6 THE CHAIRMAN: Yes, exactly.

7 MR MACLEAN: Absolutely. Yes.

8 MR HARRIS: The issue on paragraph 6 is of a different kind that we haven't yet  
9 ventilated. It's common ground that the experts should opine on the effect of the price  
10 differential by itself, because that one's been found to have been unlawful.

11 THE CHAIRMAN: Yes.

12 MR HARRIS: I'm getting a bit of a running commentary as I speak, which is a little bit  
13 distracting, but there we go.

14 Item number 2 is a different issue, which is whether you should add in for the purposes  
15 of an effect analysis, the price differential and the zonal tilt taken together. That's our  
16 wording. The reason for that is because we have pleaded, quite clearly in our reply,  
17 that the zonal tilt to which this paragraph makes reference was unlawful and therefore  
18 can't be one of the lawful counterfactuals.

19 If we succeed on that, and that's a pleaded issue, then one of the things that the  
20 experts should analyse is the effect of not just the price differential, which has already  
21 been the subject of an infringement finding, but also the effect of the price differential  
22 and the zonal tilt taken together.

23 That's the issue there. My learned friend's response to that is, "No, no, the zonal tilt  
24 hasn't been found to be unlawful, and you've only got a follow on case". But that  
25 misses the point entirely.

26 Again, I'm getting a bit of a running commentary to my right.

1 That misses the point entirely, which is that on the pleaded cases, we have a case  
2 that the zonal tilt, if adjusted in the manner with the capital "Z" and capital "T", is  
3 unlawful. So one has to analyse what would be the position without it, as well as  
4 without the price differential.

5 That then bleeds on into (iii). My learned friend wants the wording "the non-infringing  
6 aspects of the CCNs". That's because he wants to say, "Oh well, the Zonal Tilt is  
7 non-infringing because ..."

8 Again, I'm getting the running commentary, which I'm finding rather distracting to my  
9 right.

10 What he wants to say is that, "The Zonal Tilt is non-infringing, because it wasn't found  
11 to have infringed in the decision", whereas we say the more accurate way of describing  
12 it for this list of issues is: "The Zonal Tilt for which no finding of infringement was made",  
13 because it might be that at trial, on our pleading at paragraph 19 of the reply, you will  
14 agree with us that the zonal tilt was unlawful.

15 THE CHAIRMAN: Okay, I need to look at the reply then, because --

16 MR HARRIS: Yes.

17 THE CHAIRMAN: Is it the amended reply?

18 MR HARRIS: It is. The better one is in the confidential bundle, because that way  
19 there are no bits that are --

20 THE CHAIRMAN: This one?

21 MR HARRIS: Yes, it should have red writing on it and it should be tab 3.

22 THE CHAIRMAN: Yes. Yes. Paragraph?

23 MR HARRIS: It is paragraph 19, and you can happily go to the -- you don't need the  
24 first sentence.

25 MR MACLEAN: Sorry, what page number are we talking about?

26 MR HARRIS: It's bundle page 580 within the confidential bundle. It's the amended

1 | reply, but without any redactions.

2 | I just find it a lot easier to work off the non-redacted version because -- well, for

3 | obvious reasons.

4 | MR MACLEAN: It's tab 3.

5 | THE CHAIRMAN: This is MacLean saying that, "Look, this is a follow-on action".

6 | You look at the claim form. The claim form is a pure follow-on action. What's been

7 | determined is been determined as being unlawful, but there's been no determination

8 | that this is unlawful, the zonal tilt. If you want to run a case that it is unlawful, it's better

9 | to put that in your claim form rather than in the reply. But that may just be a technical

10 | pleading point. I'm just being old fashioned, but I mean, it's a -- yes.

11 | MR HARRIS: It's important to realise, though, why it's in the reply and how it's arisen.

12 | What's happened is that we've said we rely upon the finding of infringement as regards

13 | the price differential. A major thrust of the defendant's case is "Well, fair enough. We

14 | got caught for that". But in the counterfactual world, we would have made all manner

15 | of other competitive responses. One of the sets of competitive responses is to do with

16 | the zonal tilt. They say, "Look, you would have failed anyway, because we'd have

17 | fiddled around with the zonal tilt, never mind the price differential ..."

18 | THE CHAIRMAN: And you say that would have been unlawful?

19 | MR HARRIS: We say, "No, no, no, you can't do that as a counterfactual, because

20 | fiddle around with the Zonal Tilt, that would have been unlawful. So you can't run it".

21 | So it's squarely on the pleadings, and that's why we say at 19 in terms, the second

22 | sentence:

23 | "Alternatively, in any event, insofar as the defendant seeks to contend that in the

24 | counterfactual its proposed zonal tilt would have been implemented, then that

25 | suggested hypothetical is rejected by the CR." [as read]

26 | And then there are two bases.

1 THE CHAIRMAN: So what you're saying is this is purely responsive to their case on  
2 the counterfactual. So you don't put it in your claim form, for obvious reasons; you put  
3 it in your reply. I can see it is a live issue as to whether or not it's lawful or unlawful,  
4 and you say --

5 MR HARRIS: (Overspeaking) claim form, because we don't claim damages for it.

6 THE CHAIRMAN: Yes, I understand that now. Yes, I can see that what you're both  
7 doing is the right way of doing it. I've got it wrong. I would have thought it should have  
8 been in the claim form. It shouldn't. You've done it in the right way.

9 MR HARRIS: So that then takes us back to the wording. Mr MacLean wants the  
10 wording "non-infringing", because later he wants to say, "Oh, well, the zonal tilt is  
11 non-infringing".

12 THE CHAIRMAN: Yes. The fact is he's going to be entitled to say that and you're  
13 going to be entitled to say, as you pleaded, it is infringing.

14 MR HARRIS: Yes, we just think that on balance, the better wording, given that  
15 situation that the tribunal fully understand --

16 THE CHAIRMAN: Yes. Well, I didn't before but I do now.

17 MR HARRIS: -- is "for which no finding of infringement was made", bearing in mind  
18 that if we succeed at trial, you might find that it's unlawful. So it's not very helpful to  
19 have a list of issues that describes what you might find as unlawful to be  
20 "non-infringing". That's what it is. I mean, it's quite pedantic in the wording, but there  
21 we are. We're a room full of lawyers.

22 THE CHAIRMAN: What's happened is that ... (Pause)  
23 Yes, this is dancing on the head of a pin. We all know what -- we need to  
24 be -- MacLean, can you come up with some suggested wording on this?

25 MR MACLEAN: There's a complete misapprehension on my learned friend's part as  
26 to what we say they can and cannot say, and when they can and cannot say.

1 Paragraph 6 is not concerned with the counterfactual. So as we've said in our skeleton  
2 argument, it's completely illogical to mix and match in paragraph 6 which is concerned  
3 with what actually happened, not counterfactual, things that might have happened,  
4 i.e. counterfactual. We have no problem whatsoever with -- and we don't seek to stop  
5 them saying -- "in the counterfactual, this wouldn't have happened because it's  
6 unlawful".

7 THE CHAIRMAN: Yes, I know that. Yes.

8 MR MACLEAN: So what we're saying is, when you're considering the factual, you  
9 don't mix and match what is and what is not infringing.

10 THE CHAIRMAN: Look, what you want is wording that's neutral in 6 that doesn't  
11 presuppose an answer. That's what we're really looking for, and you're saying, at the  
12 moment --

13 MR MACLEAN: With respect, I'm not putting my point clearly.

14 THE CHAIRMAN: Maybe not.

15 MR MACLEAN: 6. Look at the opening words of 6.

16 THE CHAIRMAN: Yes, that's on the effect.

17 MR MACLEAN: "The effect of the price differential by itself ..." [as read]

18 That is concerned with the real world and that is concerned with what was found by  
19 the tribunal; the effect of that price differential. That was in the real world.

20 Now, there were other aspects of the real world, ie the zonal tilt, which was not found  
21 to be infringing. That's the real world. So you don't mix and match, in terms of helping  
22 the tribunal, with the effect of what actually happened by mixing and matching  
23 something which was found to be unlawful with something which was found not to be  
24 unlawful. That's why we object to subparagraph (ii). We are not saying that in the  
25 counterfactual, which 6 isn't dealing with at all --

26 THE CHAIRMAN: Yes, you say it's not. Yes.

1 MR MACLEAN: They can make their point about zonal tilt. You've seen what they  
2 pleaded in their reply. That's fine. They can do that in the counterfactual world.

3 But when the court is asking itself what was the effect of the price differential by itself,  
4 and then the other aspects of the CCNs, which were not found to be infringing, the  
5 court is assisted by splitting that out. It's not assisted in the real world by considering  
6 the effect of something which has been found to be unlawful with something which has  
7 not. That's a simple point. In the real world. In the factual world, in the counterfactual  
8 world, they can say what they like about the lawfulness or unlawfulness of the zonal  
9 tilt. It's just in the real world, that you don't mix and match them together.

10 THE CHAIRMAN: But they want to have the ability to do that analysis.

11 MR MACLEAN: Well, they can do it.

12 THE CHAIRMAN: It could be a useful analysis for the tribunal.

13 MR MACLEAN: That's dealt with already. If we go back to 2(d), we've got the zonal  
14 tilt effect there in a counterfactual world, and for that matter, 4(b) and (d). So if we're  
15 just looking in 6, which is the real world -- the factual world, not the counterfactual  
16 world -- we don't need to be mixing and matching that which have been found to be  
17 unlawful with that which has not. That's the only point I'm making.

18 THE CHAIRMAN: Okay.

19 Mr Harris?

20 Submissions by MR HARRIS

21 MR HARRIS: Sir, I just don't understand that submission at all. 6 doesn't say --

22 THE CHAIRMAN: I'm sure you do, it's just you don't agree with it.

23 MR HARRIS: Well, 6 doesn't say, "This is only about the real world, not the  
24 counterfactual world". It just doesn't say that. What it does say, however, on our  
25 wording is that in our pleaded counterfactual world, namely the one I'd just shown you  
26 in paragraph 19 of the reply, there wouldn't be a price differential and there wouldn't

1 be the Zonal Tilt.

2 In order for you -- which we respectfully contend you will have to do at trial given that  
3 pleading -- to assess the effects of that counterfactual world where there's no zonal  
4 tilt, you'd have to include, item 2. Because price differential obviously is not going to  
5 be there, because that was the infringing thing. But if on our pleaded case, you agree  
6 with us and the zonal tilt is also unlawful, then that won't be there either, and you'll  
7 have to ask yourself what would be the effect of that. So it's as simple as that.

8 As to my learned friend's other points, again, I just don't understand them. The word  
9 "zonal tilt", as I have written it down in 2(b) have now been not included, so that  
10 disposes of 2(b). Not that it makes any difference anyway, because issues for  
11 economic expert evidence is what's going on in paragraph 2. Whereas in paragraph 4  
12 and below, it's issues for forensic accounting experts. Then he refers in a manner that  
13 I couldn't understand at 4(b) and (d) --

14 THE CHAIRMAN: Where I am at the moment is that 6(i) is clear. 6(ii) to me is also  
15 clear, and that's an exercise that you should be allowed to do. Okay?

16 Then we look at 6(iii). What do you say we should have on 6(iii)?

17 MR HARRIS: Well, we say, given the context that I've explained and it seems as  
18 though the tribunal may agree with, it's better for the words, "for which no finding of  
19 infringement was made", as opposed to the words "non-infringing". Because it's very  
20 accurate to say, "for which no finding of infringement was made" when you're talking  
21 about the zonal tilt, but it's unhelpful to describe the zonal tilt as "non-infringing" if we  
22 win on our counterfactual case in paragraph 19 of the reply.

23 This is quite a constrained debate. We just say the red wording there is better than  
24 the blue wording, and so you should adopt it for the reasons that I've given. If you  
25 would go with the red wording, "for which no finding of infringement was made", then  
26 it would be fine to include the parentheses as well, because we accept that the zonal

1 tilt, as notified on 10 January 2024, is not behaviour for which a finding of infringement  
2 was made.

3 (2.51 pm)

4 Ruling on wording (submitted to the tribunal for approval)

5 (2.52 pm)

6 MR HARRIS: Thank you, sir.

7 THE CHAIRMAN: Thank you very much.

8 Submissions by MR HARRIS

9 MR HARRIS: So the words, "and/or other market entrants" as amended on the  
10 previous two pages will also remain in 6.

11 There's no issue about (a).

12 THE CHAIRMAN: Well, 6, line 4, that's going to have to be amended in the way that  
13 we'd done before. So just shorthand, it will need to be amended.

14 MR HARRIS: Exactly, sir. Consistent with how we've amended before.

15 THE CHAIRMAN: Yes, that's fine.

16 MR HARRIS: There's no issue on 6(a). 6(b) is a difference between us. Our wording,  
17 based upon the way in which our forensic expert accountant wishes to proceed, is to  
18 address you on the financial attractiveness of Whistl's plans to a potential investor. Of  
19 course, LDC was a potential investor. So it includes LDC, but the way in which he  
20 wishes to proceed is he sees his job -- and we agree -- that he should be addressing  
21 you on the financial attractiveness in the manner of the red wording.

22 But my learned friend's team wants to constrain it much more heavily, and they want  
23 to constrain, "potential investor" instead becomes just "LDC"; nobody else. We  
24 disagree with that, because what will be helpful to you, in our respectful -- (Pause)

25 I'm so sorry. I'm getting all kinds of -- (Pause)

26 I see. Apparently I'm wrong on that bit, but in any event, sir --

1 THE CHAIRMAN: Yes, but I think what MacLean's saying is that "potential investors"  
2 are included in the "and/or". It's obviously not going to be confined to LDC, because  
3 that wouldn't be right.

4 MR HARRIS: That's right, and I accept that part. But what he goes on to say and  
5 where there's a dispute between us is a limitation solely to "expected returns". So they  
6 want a much more narrow focus of the forensic accounting expert to something --

7 THE CHAIRMAN: Well, that may not be the only criterion. That's the problem with it.  
8 It's too narrow at the moment. But then I think what ... (Pause)

9 MR HARRIS: You've hit the nail on the head, sir. "Expected returns" is too narrow.

10 THE CHAIRMAN: It is too narrow.

11 MR HARRIS: Our expert is not subject to your counter order, of course. Not going to  
12 constrain himself to that, because what he says will be of assistance to you and the  
13 tribunal in assessing Whistl, you know, what they would have done or could have done  
14 in the counterfactual, is the financial attractiveness of their plans to a potential investor.  
15 That's going to be a benefit to you. If it's limited only to the "expected returns" of  
16 a potential investor, that's too narrow. Simple as that. So our wording is better; the  
17 red is better than the blue.

18 THE CHAIRMAN: Yes, but it may be that neither wording is right, and there is another  
19 alternative.

20 MR HARRIS: Well, there is of course that possibility. But at this stage, the way to  
21 deal with that, in my respectful submission, would be: it could be narrowed in due  
22 course, once you've seen the reports. That would be a way of going --

23 THE CHAIRMAN: But the problem with that is I don't want the reports to have  
24 something that's inadmissible and it's not going to help us at the end of the day.  
25 Let's just hear what Mr MacLean says on this, because I'm not sure if either wording  
26 is right. That's the problem.

1 Submissions by MR MACLEAN

2 MR MACLEAN: Financial attractiveness is far too wide, because it apparently would  
3 include matters which are not within the competence of a forensic accountant, namely  
4 funding requirements, risk preferences; these are all factual questions, which this  
5 expert is --

6 THE CHAIRMAN: I'll just say where I look at it.

7 MR MACLEAN: Yes.

8 THE CHAIRMAN: I've got no problem with the expert saying, you've got all these  
9 factors which could be relevant to an investor. Okay? What I'm not keen on is having  
10 then concluding that, because of these factors, they weigh it all up and then they say,  
11 in my opinion, this will not be attractive. I'm happy to have assistance on what the  
12 relevant criteria and what feeds in, but what I'm not looking for is the experts to say,  
13 on the ultimate issue, that this would not have been -- I think I'm clear enough, as to  
14 what I'm looking for.

15 MR MACLEAN: Yes, it's just at this stage, suggesting that financial attractiveness is  
16 the way --

17 THE CHAIRMAN: Well, it may not be.

18 MR MACLEAN: -- it should be expressed at this stage. If you're agreeing list of issues,  
19 I respectfully suggest it's not; it's far too open-ended and unhelpful.

20 THE CHAIRMAN: Well, I don't know, because I think that what I'd really want, at the  
21 end of the day, is to have what relevant, movable parts are, and the relevant movable  
22 parts being things which are, let's say, realistic candidates for that, even if at the end  
23 of the day, we are the ones who make the assessment. (Pause)

24 So, I'm not keen on the wording that either of you have proposed on B.

25 MR MACLEAN: Well, I can see that you might say what we've said is too narrow;  
26 I can accept that. I'm prepared to suggest exit values, payback periods and the like,

1 but financial attractiveness is just so wide and so unlikely to be within the competence  
2 of a forensic accountant that the vast array of things which may fall within financial  
3 attractiveness, that having such an open ended question, is going to give rise to  
4 trouble.

5 THE CHAIRMAN: What we're looking for is to have an understanding of what are the  
6 viable -- let's say the relevant moving parts. Without them, coming on to the ultimate  
7 issue, which is for the tribunal, and it may well be that there's going to be a list of  
8 considerations which are not limited to pure pound, shillings and pence. But I think  
9 we need to understand what they are, and the experts to identify them. And so --

10 Submissions by MR HARRIS

11 MR HARRIS: Maybe the answer, sir, is we try to take this away and reach agreement.  
12 It will probably be somewhat narrower than financial attractiveness, and it will be wider  
13 than expected returns, and if we can agree the language, we'll put it to you, and if we  
14 can't, we'll put to rivals, and it can be dealt with in minutes on the papers.

15 MR MACLEAN: That's sensible.

16 THE CHAIRMAN: It is sensible.

17 MR HARRIS: Thank you.

18 THE CHAIRMAN: We've got some common sense, haven't we?

19 MR HARRIS: Even a dinosaur can have the odd moment.

20 THE CHAIRMAN: What I want to know, from the experts, are: what are the moving  
21 parts, and which are the credible moving parts, even if I don't accept it's really for them,  
22 as forensic accountants, to come to a view as to what's likely and what's not likely,  
23 which is for us. You understand that's what we're trying to get? It's not encompassed  
24 in either party's wording, but that's what we're looking for.

25 MR HARRIS: I understand, and both my forensic accounting expert and my learned  
26 friend are in court, and they've heard it too. So we will put forward -- we'll get our

1 heads together --

2 THE CHAIRMAN: Yes, of course. It's absolutely fine. Okay.

3 MR HARRIS: We don't need to be detained by C, D, E and F, because that's all the  
4 other markets. So we'll move on, and in light of the discussions earlier, it seems  
5 sensible that we don't take our proposed red wording, "The likelihood of".

6 THE CHAIRMAN: No, because it wouldn't be accepted.

7 MR HARRIS: No, and we go instead for the blue wording at the start of 7: "The  
8 potential for". Yes, and I think, there's not much to be said about the other wording  
9 in 7. It should say obviously "and/or Whistl and/or any other", and then the rubric for  
10 the other market entrants from the previous one.

11 And then 8 is an issue that we have put forward that the other side doesn't agree with,  
12 and I'm wondering whether that's largely because of the words "is likely to have".

13 THE CHAIRMAN: I'm sure it is --

14 MR HARRIS: Yes.

15 THE CHAIRMAN: -- because we've already looked at that.

16 MR HARRIS: And it may be that Mr MacLean could explain whether it's the whole  
17 thing, or it's the words "likely to have", because if it's the words "likely to have", they  
18 could be changed to "may have".

19 THE CHAIRMAN: Well, it could be. The extent to which the defendants can't come,  
20 it has the potential to have affected.

21 MR HARRIS: We would be content with that, yes. We're all on the same page, which  
22 is the experts can only go so far.

23 THE CHAIRMAN: Mr MacLean is happy with that. You know what I'm trying to avoid.

24 MR MACLEAN: I do.

25 THE CHAIRMAN: We just want to have: what are the relevant moving parts?

26 Submissions by MR MACLEAN

1 MR MACLEAN: Then it seems to us that, reformulated, to take it away from an  
2 expression of opinion on a pure question of fact, which is not within the competence  
3 of the expert, as 8 was as framed, then, looking at the potential of these issues to  
4 affect the decision of LDC, well, isn't that captured already, within 6B, "the financial  
5 attractiveness", which we are going to try and come up with a better phrase, which is  
6 duplicative and unnecessary. It was originally, as framed, something which  
7 trespassed, principally, expressing an opinion on an issue of fact; the expert is not in  
8 a position to determine what effected LDC's investment decisions, what was likely to  
9 have affected it.

10 (3.02 pm)

11 Ruling on wording (continued) (submitted to the tribunal for approval)

12 (3.02 pm)

13 And that's that one. Okay, next one.

14

15 Issue 9

16 Submissions by MR HARRIS

17 MR HARRIS: This one's a bit odd, at least as I perceive it, because --

18 THE CHAIRMAN: Which one?

19 MR HARRIS: We are the ones in red, who have said "the extent to which", and then  
20 skipping out A and B just for the moment, might have affected.

21 THE CHAIRMAN: Are we looking at 9 now?

22 MR HARRIS: 9, yes.

23 THE CHAIRMAN: We've moved on to 9.

24 MR HARRIS: Yes. So, "We are the ones who have proposed the extent to  
25 which" -- then leave out the detail of A and B for the moment, and go on, "might have  
26 affected". In other words, entirely consistent with what you've just said about

1 paragraph A and previous paragraphs.

2 THE CHAIRMAN: Yes.

3 MR HARRIS: But in contrast, despite Mr MacLean having said repeatedly, "Oh, the  
4 big problem with all the red wording is it trespasses upon likely impacts, which are  
5 questions of fact", it's his wording here that says, "the likely impact of", on the et cetera.  
6 So, to be consistent, we obviously shouldn't have the words in blue at the top of 9, "the  
7 likely impact of", because that's your job. We should instead have: "the extent to  
8 which", and then "A and B might have affected". And I'll come to the wording of  
9 A and B as well.

10 MR MACLEAN: Yes.

11 THE CHAIRMAN: I don't like "the likely impact", because that gets into the problems  
12 with your wording on other requests.

13 MR HARRIS: So that's my submission.

14 THE CHAIRMAN: So I'll take that bit out.

15 MR HARRIS: Take that bit out, subject to what Mr MacLean has to say.

16 THE CHAIRMAN: And you've already got "might have affected".

17 MR HARRIS: Yes.

18 THE CHAIRMAN: Already.

19 MR HARRIS: Exactly so. And then I'm not really sure now, there's a difference that  
20 can't be resolved in the drafting of the list on A, because we can cross out the words  
21 "in a lawful counterfactual".

22 THE CHAIRMAN: Yes. (Pause)

23 MR HARRIS: Whatever A ends up saying, it should have in the words that we said in  
24 two previous paragraphs, by reference to the parties' pleaded cases.

25 THE CHAIRMAN: That's right.

26 MR HARRIS: So we had, accidentally, been omitted by us, but it should be included.

1 And then consistent with what we've done earlier today is -- from my part, I don't think  
2 there's anything in it. The blue wording is: "the defendant's potential competitive  
3 counterfactual responses". That's fine by me, on the understanding that we've already  
4 reached, which is they'll have to be set out in a letter in March, and then amended by  
5 formal pleading later on.

6 THE CHAIRMAN: That's fine, yes.

7 MR HARRIS: And then there's a bit of a difference on the end of 9. There's going to  
8 be no problem about including the words "potential investors". We're agreed on that,  
9 but then we can't have the words "on the expected returns of LDC", because that's the  
10 same wording which is too narrow, as accepted to be too narrow.

11 THE CHAIRMAN: It looks to me that you'll be able to work this out, from what we've  
12 done on previous ones.

13 MR HARRIS: Agreed. And then I am delighted to say that on the next page, there  
14 are no issues that need to be addressed, because they're all about the words "other  
15 market entrants", so they can be dealt with consistently.

16 THE CHAIRMAN: I was going to say something, but --

17 MR MACLEAN: Whatever we come up with on 6B, I think it is, will feed through into  
18 this.

19 THE CHAIRMAN: I agree.

20 (3.06 pm)

21 Ruling on issue 9 (submitted to the tribunal for approval)

22 (3.08 pm)

23 THE CHAIRMAN: So that's that.

24

25 Litigation budgets

26 Submissions by MR HARRIS

1 MR HARRIS: Penultimate item, subject to AOB, is litigation budgets.

2 THE CHAIRMAN: I did want to look at the scenarios. Do you remember we had those  
3 scenarios --

4 MR HARRIS: Yes, we'll show you. Exactly so.

5 So, I'm not aware of there being an issue with Royal Mail about any of this, though  
6 Mr MacLean will doubtless inform the tribunal if I'm wrong. But nevertheless --

7 THE CHAIRMAN: Really for us, at the end of the day, these proceedings are for the  
8 class members. The tribunal is keen to keep a pretty close view on the costs, and we  
9 will want to hear in a minute about what the experience has been for the CR, in relation  
10 to dealing with bills and everything, and the expert assistance he's had. But we'll come  
11 to that in a minute, presumably.

12 MR HARRIS: I was going to say, although I don't understand Royal Mail to have an  
13 issue, I take this part of the case seriously, and I want to show you the documents,  
14 and I want to do my best to respond to any queries that you've got about them.

15 I'm not aware of there being any issues, but can I show you the documents and you  
16 can ask me any questions you may have about them?

17 THE CHAIRMAN: Yes, of course. I think that's probably what we can do. If  
18 Mr MacLean wants to add something as we go along, he's welcome to.

19 MR HARRIS: I'm in bundle B1, so the case management bundle for today.

20 THE CHAIRMAN: Yes.

21 MR HARRIS: Towards the back of the first volume.

22 THE CHAIRMAN: Yes.

23 MR HARRIS: I'm at tab 22. What you find there is an updated cost budget for my  
24 party, dated last week or so.

25 THE CHAIRMAN: Yes.

26 MR HARRIS: 5 December, which is obviously when it was prepared. It is pretty

1 self-explanatory, but can I just identify, I hope for your ease of reference, what the  
2 colours are and then what the notes are. I'm obviously not going to go through the  
3 whole thing. There is what's been incurred in the sort of columns two, three and four,  
4 in very light brown/grey; then in the next -- one, two, three, four, five -- six columns is  
5 the budget; and then there's the budget total you can see in the variance.  
6 Now, the green numbers are where the spending by the CR's team to date has been  
7 below the budget. So if you like, that's slack, the green numbers.  
8 THE CHAIRMAN: Wait. When I look at "First CMC and certification".  
9 MR HARRIS: Yes.  
10 THE CHAIRMAN: I've got in green --  
11 MR HARRIS: Yes.  
12 THE CHAIRMAN: -- a figure.  
13 MR HARRIS: That's right. It's an underspend in actual fact compared to what was  
14 budgeted for that stage.  
15 THE CHAIRMAN: Yes, and red is overspend?  
16 MR HARRIS: Exactly so. That's why they're in different colours. Then the detail of  
17 that is, I hope, helpfully spelled out in all of the notes. So take, for example, between  
18 the two hole punches, halfway down, "Notes regarding", then under the heading  
19 "Lewis Silkin fees". Let me give you an example.  
20 The original LS budget for the defence reply stage was 350,000. Actual expenditure  
21 was 219,551, resulting in an underspend of 130,449. And you can see that figure in  
22 green in the fourth column from the left, four lines down; did you see where it says  
23 variance the first green number?  
24 THE CHAIRMAN: Yes, Yes.  
25 MR HARRIS: Then the rest of it follows. So I'll happily read them out, but it may be  
26 easier if you --

1 THE CHAIRMAN: No, you don't need to. I've looked at this.  
2 Yes. (Pause)  
3 What I'm seeing is a high, relatively high burn rate relative to Royal Mail. Now, the  
4 reason for that is that Royal Mail's been through this exercise already in the Whistl  
5 proceedings. So in a way these proceedings are going to be less expensive for them  
6 than if these were the only proceedings, because they've already incurred a lot of costs  
7 in relation to Whistl, and that was settled at a late stage.  
8 What I'm keen to understand is the extent to which the CR has got a grip, with  
9 obviously professional assistance, on the amounts being spent; that's the first point.  
10 Secondly, where are we on the potential squeeze and potential conflicts between the  
11 lawyers and the funders in the way that we've seen in other cases? I'm talking about  
12 Merricks and Gutmann v South West Trains. You've read the two judgments on that.  
13 What I'm mindful about is you have an initial budget; the funders say we will fund you  
14 up to the initial budget, the litigation is more expensive than anticipated. That can be  
15 for a whole host of reasons: it may be because you've done an underestimate; or  
16 you've got more things to fight; or the other side are more difficult and they're making  
17 it more expensive; or disclosures a lot bigger than you envisaged.  
18 Then you get to a situation whereby you've got to your budget and the funder says,  
19 "Well, that's all very interesting, but all we've agreed to do is to fund you up to the initial  
20 budget", and then you find as lawyers that you've eaten up your budget; everything  
21 else is deferred fees. So you're not going to get paid that, at least at this stage.  
22 Then you get to the next question, which is any contingency uplift if you're successful,  
23 and then you end up having a settlement. Then before you know it, you may have  
24 a scenario whereby there could be a real squeeze for the lawyers, or a real squeeze  
25 for the funders. All these things have to be really carefully monitored as you go along,  
26 because at the end of the day, nothing is going to be paid out if there's a settlement to

1 | anyone, unless it's approved by the tribunal.

2 | We do not want to have outcomes where there are disputes between funders and  
3 | class representatives and lawyers. These things need to be managed very carefully,  
4 | and what I've seen on this case is perfectly fine. I've seen how people have been  
5 | flexible; I've seen how the arrangements were changed and everything like that. So  
6 | I've got no concern at the moment. It's just that second point I'm giving you is really  
7 | got to be borne in mind throughout.

8 | Both funders and the lawyers need to be sensible about where we are, otherwise  
9 | you're going to find, as I've pointed out in Gutmann that you have the three-legged  
10 | chair and you lose a leg. You know, you've got the lawyers, you've got the funders  
11 | and you've got the ATE insurers.

12 | That's a balance that -- what the tribunal wants is something that you're looking at all  
13 | the time, people are beginning to be sensible, and we don't have the sort of problems  
14 | that we're seeing in other cases.

15 | Also, when it comes to -- let's say you have a settlement. If you're doing what hopefully  
16 | the CR is doing, the tribunal is going to be a lot more relaxed about what the figures  
17 | are and the reasonableness of the fees in approving payment out. What's not  
18 | desirable is, when you get to that last stage, the tribunal is saying, "Well, we don't  
19 | know what the figures are, whether they're reasonable or not or whatever", and then  
20 | you have to appoint someone else to go and look at it. I just want to avoid that type  
21 | of scenario. All three stakeholders, I'm sure, are being represented today and can  
22 | hear what I'm saying on that.

23 | MR HARRIS: Sir, I'm pleased to report this ...

24 | THE CHAIRMAN: Yes.

25 | MR HARRIS: First of all, as I said before, as regards Mr Aaronson's role at the  
26 | claimant company --

1 THE CHAIRMAN: Yes.

2 MR HARRIS: -- he takes those responsibilities very seriously in all respects, expressly  
3 and deliberately including the funding. Now, he and for that matter, I -- we don't have  
4 any concerns as at today; there's nothing I feel like I need to report to you about  
5 funding or developments or changes or variances, and nor am I instructed to do so by  
6 Mr Aaronson.

7 That's because we are taking it seriously and on an ongoing basis, and one way in  
8 which that is continuing to happen is with the continued engagement of Practico, who  
9 do scrutinise bills and who do make comments. They, you know, they say, whatever,  
10 "This is good, this is not so good, knock a bit off", whatever.

11 The detail is neither here nor there. That is ongoing. Secondly, we have produced, if  
12 you wanted to see it, the updated scenarios document. That's at the next tab --

13 THE CHAIRMAN: Have we finished the cost for now?

14 MR HARRIS: Well, unless you have any questions for me, I don't have anything else  
15 to say about the updated cost budget.

16 I suppose I should just maybe -- it was going to be the third thing, but before we turn  
17 the page, I might just identify for you. You pointed out a moment ago, correctly, that  
18 at least at this stage, Royal Mail ought to have spent a fair degree less than us,  
19 because they've been through a large part of this before, especially on the disclosure  
20 stage, which tends to be so expensive. But it won't have escaped your attention, which  
21 is at CMC bundle B, Tab 73 that Royal Mail has identified what it calls "a budget", but  
22 is in fact a one-page letter which has one material paragraph, that says that their costs  
23 to date are £2.8 million, so less by quite a large amount than our cost to date. But that  
24 somehow by the end of the trial, their costs are going to be considerably more.

25 THE CHAIRMAN: The 21 point something, yes.

26 MR HARRIS: Yes. I don't have a particular submission to make about that now, save

1 that, in the same way, in my respectful submission that the tribunal both should and is  
2 keeping a careful grip upon how the CR spends money, the tribunal -- I put it no higher  
3 than this -- ought to consider whether it should exercise a bit more of a grip upon the  
4 considerably larger budget from Royal Mail, especially when, as you pointed out, the  
5 most expensive step ought to be of very little expense for them.

6 But I don't take it any further than that today; it's just -- you've got the outline, you may  
7 want some more in due course.

8 THE CHAIRMAN: Can I just remind myself what I said about what was expected --

9 MR HARRIS: Yes. It's in --

10 THE CHAIRMAN: -- in the last ruling.

11 MR HARRIS: Yes, there's a bit in the transcript, and Mr Rayment and Ms Bernstein  
12 can --

13 THE CHAIRMAN: Well, don't worry about the transcript. Where is it in the ruling?

14 MR HARRIS: Yes. Let me just find that.

15 There was, as I recall, a little bit of an issue about the precise wording. You came  
16 down on a decision, and we wanted -- I think I'm right in saying -- something a little bit  
17 more prescriptive for Royal Mail to provide.

18 THE CHAIRMAN: I'm just going to look at the ruling at paragraph 64 onwards.

19 MR HARRIS: I'm told it might be 70. Paragraph 70.

20 THE CHAIRMAN: Okay, just let me quickly read this. (Pause)

21 I was hoping, to be quite frank, to have something a bit more detailed from MacLean's  
22 side on that, but it's not critical at this stage because they're still fairly early on in the  
23 stage.

24 Mr MacLean, when it comes to the next CMC, if we can have a bit more of a detailed  
25 cost figures, more similar to what the other side have produced, that would be very  
26 helpful. I'll tell you why I want that, because it's to help you rather than not to help you.

1 MR MACLEAN: Yes, it is.

2 THE CHAIRMAN: Because on the ATE cover --

3 MR MACLEAN: You say that they're (inaudible).

4 THE CHAIRMAN: Yes. I really do want to make sure that if this case goes one  
5 way -- and I haven't a clue which way it's going to go -- I do want to make sure that  
6 you are covered for this.

7 MR MACLEAN: We're obviously very grateful for that.

8 THE CHAIRMAN: Yes.

9 MR MACLEAN: As far as where we got to in terms of the detail that you got --

10 THE CHAIRMAN: Yes.

11 MR MACLEAN: -- I'm told that there were competing orders flying around and the  
12 tribunal plumped for an order which, we took the view, allowed us to provide what we  
13 have provided. They wanted more, we wanted less, and you decided that we were  
14 right. But I hear what you say in terms of the next hearing.

15 THE CHAIRMAN: Yes, next time, I want one more similar to the one they've given us,  
16 so we have a complete picture of that. Disclosure is -- we haven't discussed that yet,  
17 but we will discuss it in a minute -- not going to be cheap. I know that whatever you  
18 may have done in the Whistl proceedings, you've passed on that already.

19 MR MACLEAN: Yes.

20 THE CHAIRMAN: But it's what's on top of that is going to be potentially expensive, or  
21 not. We'll see what comes out of it.

22 MR MACLEAN: Yes. I mean, standing here today, as far as we're concerned, they've  
23 got the Whistl disclosure. They've got the disclosure from third parties in the Whistl  
24 case, LDC, PostNL, they've got all of that. We're not expecting there to be vast reams  
25 of more disclosure from us.

26 THE CHAIRMAN: Yes, but then that raises the question is how do we get to the

1 £21.6 million, or £20 or whatever the figure is. What I'm looking for is once we get to  
2 the next CMC, we have a more detailed one, similar to the one they've got, and we  
3 can be looking at like to like. I do not expect your figures to be the same because  
4 you've got different things to do.

5 MR MACLEAN: Yes, indeed.

6 THE CHAIRMAN: But I do want to have a grip, to a certain extent, on what the costs  
7 are.

8 Okay, thanks very much, Mr MacLean. Can we now look at the scenarios?

9

10 Expert evidence and sequencing

11 Submissions by MR HARRIS

12 MR HARRIS: Yes, so just while we turn that up. So the order will say that in good  
13 time before the next hearing, Royal Mail will provide this updated budget. Is that what  
14 you had in mind?

15 THE CHAIRMAN: Yes, but at the next CMC and certainly once disclosure has been  
16 completed, if there's no CMC, I will want a costs budget, in the same form that you've  
17 produced, telling us what's been incurred and what the anticipated costs are to trial.

18 MR HARRIS: Understood, thank you. I only raise that because there was a bit of  
19 a to-do after the last hearing.

20 THE CHAIRMAN: No, I know. It's probably my fault for not being clear enough, but  
21 I think what they did is absolutely fine for purposes of today. But once we get to  
22 disclosure and that stage having been reached, I really do want to look at the figures  
23 in more detail for both sides.

24 MR HARRIS: Great.

25 Tab 23, then, is the updated scenarios document. It takes the same form as the one  
26 you saw before the September CMC. Therefore, you'll probably have a familiarity

1 through your memory as to the way it works.

2 So let's say, just hypothetically, top line, "quantum amounts" go to the far right-hand  
3 side. Let's say the case settles for or ends up in a damages award of 50 million. Then  
4 go down one set of rows to scenario 1.

5 THE CHAIRMAN: Yes.

6 MR HARRIS: So after disclosure. So plainly, the 50 million will be a settlement  
7 amount there, not a trial amount, obviously. Then at that stage, the funding costs  
8 would have been, according to the contractual setup, 52, which is therefore  
9 104 per cent of what the recovery is, leading to a nil amount -- well, technically  
10 a negative amount on the maths for the class -- of -4.8 per cent.

11 So plainly, that's not satisfactory to anyone. But those are the hypotheses. It's only  
12 50, but it comes at that date.

13 If you move to the left, now, to the penultimate column, the one with 100, that's where  
14 the recovery through settlement or trial is 100 million. "Self-evidently", the analysis  
15 there looks a lot rosier, because the funding amount of "self-evidently" is the same,  
16 because it's at the same date. I'm looking here at scenario 1. Then if the 100 million  
17 has been recovered, then on the contractual documents, 52 per cent is a funding  
18 liability, but there's 47 left over for the class.

19 Then you move left, and obviously the higher the amount of recovery, the better it  
20 looks in terms of the relative proportions of what would go on the contractual  
21 documents --

22 THE CHAIRMAN: The way I looked at it last time is once you get anything (inaudible),  
23 50 is not great, 100 is fine, there's going to be enough to share sensibly, and anything  
24 above that, well, it's so much easier.

25 MR HARRIS: Exactly, sir. It depends partly on the date. So if you go to scenario 2,  
26 the later you're on obviously 100 --

1 THE CHAIRMAN: Yes (overspeaking) quantum.

2 MR HARRIS: Exactly, sir. If you only got 100 post-trial on the contractual documents,  
3 you look down at scenario 4, the penultimate column at the bottom, then, again, it  
4 doesn't look good there on the contractual arrangements. But plainly, if you go all the  
5 way to trial and you get say, 300 million, then all of a sudden it looks a lot rosier for  
6 everybody. I mean, it's just basic maths.

7 THE CHAIRMAN: The tribunal is mindful that the Whistl case did settle and that there  
8 may be some merit at some stage in having some sort of mediation or whatever  
9 between the parties. I don't think we've reached that stage at the moment. It's too  
10 early for either of you to really take that sort of line, because if you're going to settle,  
11 you want to settle with sort of a pretty good idea as to what the likely outcome is. At  
12 the moment, that's quite a difficult task, certainly for me on the material I've seen. You  
13 know, we haven't got the expert reports.

14 But once you get to a certain stage, both teams should really consider: is it better to  
15 settle or not settle? Because the longer it goes on, the more money that's spent and  
16 the bigger squeeze for everyone as to where you go. You could get to a certain stage  
17 where it's just not possible to settle because the maths doesn't work.

18 MR HARRIS: I agree, 100 per cent, sir. Forgive me, but I make the rather obvious  
19 point that obviously the longer it goes in the litigation, the more of these scenario steps  
20 that have to be complied with, then the more money for any realistic settlement has to  
21 be produced. Otherwise, there's no choice but to fight.

22 In other words, to put that a different way, there's a great incentive on the part of the  
23 defendant to settle earlier rather than later. But I'm only stating, in some ways, the  
24 obvious.

25 THE CHAIRMAN: Yes, okay, so what we'll do, unless Mr MacLean's got any  
26 comments. No, he doesn't.

1 Okay, what we'll do is we'll take our break now, and then we'll want to go through the  
2 directions. Now, before we do that, show me where the current directions are,  
3 Mr Harris.

4 MR HARRIS: I think it's bundle B1, tab 2.

5 THE CHAIRMAN: So those are the ones we made last time, yes?

6 MR HARRIS: No, this is the --

7 THE CHAIRMAN: No, I want to look at the ones we made last time.

8 MR HARRIS: Oh, I beg your pardon. Yes, if somebody could tell me what the  
9 order -- I think that's a different bundle. (Pause)

10 THE CHAIRMAN: So what page?

11 MR HARRIS: It's the core bundle, section C, and then the directions order from the  
12 September CMC is at tab 7. (Pause)

13 I beg your pardon. I stand corrected. Tab 12, thank you, beginning at page 719.

14 THE CHAIRMAN: Which file am I meant to be looking at?

15 MR HARRIS: Well, it might be helpful to have them both open.

16 THE CHAIRMAN: No, I'm just trying to find which file.

17 MR HARRIS: Yes, tab C12 of the core bundle.

18 THE CHAIRMAN: So let me get the core bundle.

19 MR HARRIS: Yes.

20 THE CHAIRMAN: Yes.

21 MR HARRIS: Then you'll see the order for directions that you and your colleagues  
22 gave after the last CMC --

23 THE CHAIRMAN: Okay, let me just --

24 MR HARRIS: -- called, "Directions to trial". (Pause)

25 THE CHAIRMAN: Yes, so we'll have that open when we go through the --

26 MR HARRIS: You'll probably find it helpful to have them both open.

1 Then the other one -- because the proposal by us is to amend C, tab 12 by reference  
2 to the draft order -- that is in a different bundle, namely case management bundle B1.  
3 THE CHAIRMAN: Well, let me just see -- because someone's printed out -- I was  
4 working from 1, but I don't know whether this is the up-to-date 1.  
5 MR HARRIS: I hope that you have in your bundle, B1, tab 2, an up-to-date composite  
6 directions order for today with rival wording in red and blue.  
7 THE CHAIRMAN: What date is it? I've got one dated --  
8 MR HARRIS: 16 December.  
9 THE CHAIRMAN: Yes, this is the one I've been working from.  
10 MR HARRIS: Yes, and that's the right one, I'm pleased to say.  
11 THE CHAIRMAN: Okay, so I'll have both open --  
12 MR HARRIS: Yes, that might be the easiest way.  
13 THE CHAIRMAN: -- and we'll go through them one by one.  
14 MR HARRIS: Thank you.  
15 THE CHAIRMAN: When we get to disclosure, there are things to discuss on  
16 disclosure. We can do that when we get to it. Because you want more time, and  
17 I want to have clarity as to where we are and what's been happening on disclosure  
18 and how much is envisaged to be in issue -- or is this going to be a short Redfern  
19 schedule? Is it going to be a big Redfern schedule? Will we need another hearing  
20 pencilled in to deal with that? All of that I don't know anything about now.  
21 MR HARRIS: No, I'll do my best to (overspeaking) with all of those.  
22 THE CHAIRMAN: You'll educate me at the time.  
23 MR HARRIS: Do I apprehend correctly that the tribunal has had an opportunity to  
24 read the detailed letter at tab 78 at bundle B2, which is --  
25 THE CHAIRMAN: That's a very dangerous question to ask, because if you put it in  
26 those wordings, we've had the opportunity to do a lot of things, but whether or not we

1 have done -- but I have read --

2 MR HARRIS: I'm far too polite to just ask straight out.

3 THE CHAIRMAN: Yes, so which ones --

4 MR HARRIS: It's bundle B2. Sir, the second CMC bundle, tab 78, there's a letter from

5 my instructing solicitors, dated 9 December.

6 THE CHAIRMAN: I've marked all over that.

7 MR HARRIS: Oh, good. I mean it's quite granular, but it explains --

8 THE CHAIRMAN: No, I've been through it and I've got my notes on it. So you want

9 me to be ready to look at that when we get to it, but I have --

10 MR HARRIS: Not least of all, sir, because on the topics that are addressed in this

11 letter, that's it. I mean, I don't have anything above and beyond what's happened on

12 that.

13 THE CHAIRMAN: Yes, well, what you're saying is, "We're behind non-disclosure. We

14 need more time", and you want to push back the whole timetable by four months.

15 MacLean says, "No, we don't want to have it pushed back that amount". They're

16 probably willing to have it pushed back by a certain extent, but not four months,

17 "because we need to have a bit of fat in the timetable". Because although 2028 does

18 feel a long way away, it's much better to leave in some of the fat now, because if we're

19 giving up some of the fat now, where are we going to be in a year's time?

20 Yes, so we're going to have to see where we are on that and where we have a landing.

21 You're not likely to get four months, but we'll have to see what is a reasonable period.

22 MR HARRIS: I accept that.

23 THE CHAIRMAN: You could speak to Mr MacLean and see if you can come to an

24 agreement as to what you think that period is, but it's not going to be four months and

25 it's not going to be zero.

26 MR HARRIS: Well, exactly. The battleground at the moment, we asked for four, he's

1 prepared to offer one, and you're saying we won't get four, but we may get -- well, I'm  
2 not sure we'll be able to reach agreement on that, but we'll try.

3 THE CHAIRMAN: You never know. Mr MacLean's is not an unreasonable person.

4 MR MACLEAN: Or a dinosaur.

5 THE CHAIRMAN: Sorry?

6 MR MACLEAN: Or a dinosaur.

7 THE CHAIRMAN: No, yes, exactly. But it's ...

8 MR HARRIS: Good. Well, in that case, should we take a short break now?

9 THE CHAIRMAN: We'll take the short break now. I'll take this wording with me, and  
10 we'll be back at 3.45 and we'll run through whatever's left.

11 But I think before we run through whatever's left, if you can just give me, orally, where  
12 we are on disclosure and how you envisage the Redfern schedule process and how  
13 big the exercise is. I've just spent three days doing a Redfern schedule. I really don't  
14 want to spend another three days doing a Redfern schedule, but that was 120  
15 disputed items.

16 On this, given what MacLean's team has already done and provided you with all this  
17 disclosure, almost like off the shelf for you, I would hope that insofar as there are  
18 issues for Redfern schedules, they're fairly targeted. But we'll see what you come up  
19 with.

20 MR HARRIS: I'll (overspeaking) address you on that to the extent I can.

21 THE CHAIRMAN: But if you can address me as to how intense you envisage it. I know  
22 a lot of the stuff you've only recently had and you haven't had time to analyse it all. It's  
23 easy enough for me to say, "Oh, you should have analysed it all by now", but it's not  
24 that simple.

25 MR HARRIS: Exactly, sir. So just for your notes. The major issue is four months  
26 versus one month and why and what have you. We just identified that.

1 But strictly speaking, there are two other much more minor issues on the directions.  
2 One is you left over for today whether experts' report should be sequential or  
3 simultaneous.

4 THE CHAIRMAN: I've got views on that and I'll go through that when we come to it,  
5 yes.

6 MR HARRIS: And of less importance and indeed could be deferred, you also left over  
7 the question of whether, I think, pre-trial submissions should be simultaneous or by  
8 way of -- sequential. I can't remember which order I put them in . Anyway, the same  
9 issue.

10 Frankly, you don't need necessarily to decide either today. But it would be helpful,  
11 I think, to both parties to decide on the expert one, because that will be --

12 THE CHAIRMAN: Yes, the expert one, we'll debate that, because there's a number  
13 of ways of doing it.

14 MR HARRIS: Yes.

15 THE CHAIRMAN: What I'll do is I'll say what the end game should be and then we'll  
16 see what's the best way to get the end game. If we can do it that way.

17 MR HARRIS: Yes.

18 THE CHAIRMAN: Because then that may factor in it as to how we get the format of  
19 the expert reports. But I'll explain that when we come back.

20 MR HARRIS: I also raise it now, just before the short break, for this reason, that I'm  
21 conscious that under the tribunal's publicised approach to expert evidence, which has  
22 been coming for a while and in particular Mr Tidswell's statement at the recent  
23 conference, that some tribunals may now like there to be a, if you like, new and  
24 additional stage -- I don't mean that in any judgmental way -- whereby perhaps not  
25 that far before trial, experts put in, if you like, additional new and, if you like, composite  
26 reports that overtake reports that are on a more orthodox timetable.

1 Now, that isn't yet contemplated in any of our orders. But I raise it now because I feel  
2 it's my responsibility that when we're talking about general directions towards trial, if  
3 that is a thinking process on the part of this tribunal, then the sooner the parties know,  
4 the better.

5 THE CHAIRMAN: We'll have our break, but if I could just say where I'm from. I don't  
6 want to be too prescriptive and force in stone what has to be done. But what I really  
7 want is something that I can easily absorb when it comes to trial. What isn't helpful is  
8 to have a multiplicity of expert reports and "One report refers back to my first report",  
9 and all that. It's a recipe for confusion for people who are as simple as me. You know,  
10 it's not that easy in some of these cases to weave your way around some of these  
11 expert reports.

12 That doesn't help, because your job as an advocate is to educate us. The best way  
13 to educate us is to simplify. That's the skill of any great advocate. It's to simplify, get  
14 to the heart of what it is. There are many issues that the experts, that if they're left on  
15 their own, they'll want to go into down this alley and that alley. But at the end of the  
16 day, many of these issues are experts look into don't really come up.

17 If you look at what happened in the Trucks case, the one that went to judgment, you  
18 can see what happened. You know, you've got a mass of expert evidence, kind of all  
19 come up with a precise figure when there is no precision, and then you end up with,  
20 you know, a judgment of Solomon, and you have the risk of extreme positions either  
21 way. I don't want that to happen on this case, and it's down to you and MacLean to  
22 make sure it doesn't.

23 MR HARRIS: That's helpful.

24 THE CHAIRMAN: That's what I'm really looking for. So when you say, "Well, you  
25 know, there's this suggestion that you can have -- each party then prepares a new  
26 report at the end of the process" ... (Pause)

1 We can look at that, but you two have to figure out what do you think is going to be  
2 the simplest way of presenting this case for the tribunal. Because I'm looking to you,  
3 rather than -- there's so many different ways of slicing this cake. What we're trying to  
4 get is simplicity, not a multiplicity of issues. Avoid the blind alleys and something we  
5 can absorb.

6 Where it works really well, when you get to the joint report of the experts, is you have  
7 clarity as to what the real issues are. You remember the Paroxetine case. That list of  
8 issues by the experts was exactly what made that case manageable, which otherwise  
9 wouldn't have been manageable. That's where really good co-operation between the  
10 experts and give and take can make a huge difference for the tribunal.

11 But we'll come back to this in a minute. Okay, so we'll be back at, let's say, 3.50.

12 Thank you.

13 (3.41 pm)

14 (A short break)

15 (3.58 pm)

16 THE CHAIRMAN: The final straight, yes.

17 MR HARRIS: Sir, I'm pleased to report that some meaningful, substantive  
18 conversations are going on between the parties right now, as to whether they can  
19 reach agreement on extensions, less than four months, but above zero. And for that  
20 reason, and since I may be able to report either total or near-total agreement later on  
21 this afternoon, could we perhaps start with the two more minor questions of sequential  
22 or simultaneous, particularly for the experts reports?

23 THE CHAIRMAN: On the expert reports, what we're trying to avoid is an unnecessary  
24 multiplicity of reports. But what seems to happen is that some courts and tribunals  
25 give people two full rounds, others give you one round each, and others give you, in  
26 reality, two rounds of one and one round for the other, and you can play around with

1 | which of the different models.

2 | Now, when we look at this base question, of when they serve their initial reports:

3 | should there be sequential? The tribunal having discussed it, we're more in favour of

4 | having it sequentially, because the advantage is, everything's going to be clarified by

5 | these letters and the amended pleadings and notices that we've already issued. Your

6 | side serve your report, Mr MacLean's side serves their report, and then the issue then

7 | arises: what comes after that? And if what comes after that is a report from your side,

8 | and that's it for now, that is fine. But if what the parties are thinking, of having

9 | sequential, and then two expert rounds each, that really goes against the whole

10 | concept of having sequential in the first place.

11 | So, it's really a question of listening, from both of you, as to what you're really looking

12 | for. If I can go back at the front and say, "What we're looking for is something that's

13 | manageable", what I envisage will happen is that when you get to the meeting of the

14 | experts, it's only then, with the benefit of the reports and understanding where they

15 | are, the experts start really engaging each other with the issues, and it comes out as

16 | to what the key points are that the tribunal needs to consider. You then have a good

17 | expert, a joint report, which says, "This is what we've agreed, this is what we can't

18 | agree, this is why we disagree, and here's a summary of our positions", and then you

19 | go into the trial, and the question is whether do you think it's going to assist anyone,

20 | that we have another report, which is each side prepare a report setting out, in one

21 | document, what their case is. (Pause)

22 | There's cost implications of doing that, that's one thing, but even if you do that final

23 | step, there's always the risk that the parties are then going to, in cross-examination,

24 | refer back to what was said in some report earlier on in the proceedings, and before

25 | you know it, you're considering a mass of stuff. I'm just trying to work out what you

26 | and MacLean think is going to assist us the most, on having something that's digestible

1 at the end of the day, and at both sides having a reasonable opportunity of responding  
2 to what the others have said.

3 MR HARRIS: Well, can I say what we propose, which we think would be of most  
4 assistance, but then caveat it with: we are quite in the hands of the tribunal, and we  
5 want to be of assistance. So, if me having set that out, you say, "Well, I've listened to  
6 that, but actually we think it'd be more helpful", then we're in the market of being  
7 helpful.

8 THE CHAIRMAN: Okay, fair enough.

9 MR HARRIS: So, the way we envisage it, is that there would be -- what I would call  
10 relatively orthodox. Both parties exchange a first report, particularly where both  
11 parties have positive cases, which we now know to be this case. Royal Mail's joint  
12 experts have said, "We do have a positive case", at least in part.

13 THE CHAIRMAN: Yes, they've got a positive case to half, but not on the DiD model.

14 MR HARRIS: Yes.

15 And then, what I envisage as being the most helpful, and that by the way those reports  
16 would be page limited, sensibly, but nevertheless page limited, and we've all heard  
17 loud and clear that they have to focus upon the key issues and not run down rabbit  
18 holes et cetera.

19 And then, after an appropriate amount of time, a standard period of weeks, or at most  
20 a couple of months, there would be a reply report from both experts, but with an even  
21 tighter page limit, and being genuinely reply. And in that sense, we will have received  
22 the -- if I'm right -- the positive case from Royal Mail, as a minimum, first off, and we  
23 get to reply to it, and then that's the end of that, and they will obviously have seen our  
24 positive case in our first report, and they will get to reply to that.

25 So, in other words, what I'm advocating is what I would call a fairly standard orthodox  
26 approach of initial experts' reports with everything in, and then a reply report for each

1 with everything in, albeit page limited. And then obviously we would have the experts'  
2 meeting and a controlled list of issues for expert evidence, without it being some  
3 voluminous schedule.

4 I am not advocating, even though I raised it for the short adjournment as something  
5 that's a live issue and out there, a then further round, closer to trial and after the joint  
6 experts' meeting, at which essentially both the initial report and the reply reports get  
7 overtaken by a new report from both sides, synthesising their positions from reports 1  
8 and 2, and possibly from the joint expert report. I'm not advocating that; I only raised  
9 it because it's a live issue out there at the moment, and the tribunal said, officially  
10 through Mr Tidswell, it said, "Look, that's something that might happen".

11 So, I hope that that's at least clear as to my --

12 THE CHAIRMAN: That's very helpful. Let's hear what MacLean's got to say.

13 Submissions by MR MACLEAN

14 MR MACLEAN: Yes, what I've got to say about this is this: we suggest it should be  
15 sequential, for the good reason, we submit, that as you identified, Mr Hunt is not going  
16 to be dealing with the DiD, so it doesn't make much sense for his response to come to  
17 that in a reply report. It's likely, to save costs and time, for him to deal with everything,  
18 which my learned friend's expert says, in his main report.

19 Now, the sequence I would propose: claimant's reports, followed by whatever  
20 appropriate time limit you give, followed by the defendant's reports, followed by a reply  
21 report, which deals with, on the part of the claimant, dealing with points which he hasn't  
22 been able to deal with obviously, by way of the first report. There should then be  
23 a joint statement of the experts, and we do see that there is sense, at some stage  
24 before trial, for the court to be presented with summaries of the expert evidence, but  
25 not giving any option to the parties to add new points into those summaries. Those  
26 summaries -- you could say it could be a five-page summary, a ten-page summary, or

1 whatever. But we suggest that is likely to be the most cost effective, and just way of  
2 dealing with, where we are now.

3 So, we do advocate a sequential, for the reasons I've given and for the reasons we  
4 set out in our skeleton argument.

5 (4.07 pm)

6 Ruling on expert evidence and sequencing (submitted to the tribunal for approval)

7 (4.11 pm)

8

9 Extension

10 Submissions by MR HARRIS

11 MR HARRIS: Sir, I'm grateful. As I say, the second and minor issue was whether or  
12 not you even want to address the question of opening submissions at trial, sequential  
13 or -- in my respectful suggestion, we just leave that over. We're such a long way away  
14 from it.

15 THE CHAIRMAN: I think we are a long way away from it, so I think we don't need to  
16 deal with that. We'll be having a PTR anyway and the PTR we can make more detailed  
17 directions as to that.

18 MR HARRIS: I'm most grateful.

19 May I just take some instruction? I want to know if we've reached any agreement,  
20 subject to your order on the extension.

21 There's been no agreement on the dates, but Mr MacLean helpfully told me openly,  
22 so I'm at liberty to repeat it to the tribunal, that they are prepared to agree to an  
23 extension of the existing dates on disclosure, not by one month, but by two. So we're  
24 now -- we asked --

25 THE CHAIRMAN: That's exactly what I would have ordered.

26 MR HARRIS: Yes.

1 THE CHAIRMAN: So he's looked at the crystal ball and he's come up with the right  
2 figure. That's fine.

3 MR HARRIS: Right, save that my instructions are that we require more than two, and  
4 I won't take a long time over this, but we would like more than two and closer to four.  
5 I recognise four's not essential, and the reasons for that are the ones that are set out  
6 in our --

7 THE CHAIRMAN: Your letter. I've read the letter at tab --

8 MR HARRIS: I'm not going to repeat any of them, and I must say, we're not seeking  
9 to blame Royal Mail for any of this. These are not problems that they've caused, but  
10 they are nevertheless problems. We have to be realistic about this. My submission  
11 is that it doesn't do anybody any favours to make an order that is really not going to  
12 be capable of being dealt with.

13 My learned friend suggested in his skeleton -- and one understands why he made  
14 it -- which is that, "Oh, well, if you say it's going to take you four months, why didn't  
15 you just hire some more people, recruit some more people, and then it'll be quicker?"  
16 The answer to that is: no, it doesn't follow that just hiring more people, spending a bit  
17 more on it, makes it quicker. There are actually diseconomies of scale in trying to get  
18 in outside people, who then have to read in and familiarise themselves, at the same  
19 time when there are other people who are more familiar with -- anyway, you know the  
20 way it works logistically.

21 THE CHAIRMAN: I do.

22 MR HARRIS: My respectful suggestion is that I understand the tribunal's reluctance  
23 about four months, I can understand why Royal Mail has said openly, and I'm grateful  
24 to them, "Okay. You know, let's be realistic about this, you can have two months", but  
25 my submission is it needs to be somewhere in the middle of those, closer to three  
26 rather than two, just because of the sheer practicalities.

1 What we don't really want is a situation in which the order, say, now is for two months,  
2 and then three weeks before or two weeks before that, we come along and we say,  
3 "Well, guess what? We tried really, really hard, we recruited some more people in an  
4 efficient manner, but we're just not being able to do it, which is what we told you  
5 before".

6 So the better course, and likely to cause less disruption and therefore use up less of  
7 the tribunal's scarce resource, is, in my respectful submission, to make it at least  
8 three months rather than two.

9 Unless I can assist further, those are my submissions.

10 THE CHAIRMAN: After the submissions of Mr Harris, we're prepared to give you  
11 a ten week extension from the current timetable.

12 MR HARRIS: I'm grateful, and then I'm apprehending that the dates and the details  
13 can be worked out.

14 THE CHAIRMAN: Oh, yes, they can be worked out. So if you can now tell me where  
15 we are, or where you think we may end up on the Redfern schedule. I've read  
16 everything else, but you haven't really -- I don't have a feel for how much over and  
17 above what you're being given you're likely to be digging in, and all of that.

18 MR HARRIS: Yes. There's a limited amount I can say about that.

19 THE CHAIRMAN: Yes.

20 MR HARRIS: As per the letter, some of the disclosure is being looked at; more of the  
21 disclosure that emanated from Royal Mail as opposed to LDC or Whistl. So I can't  
22 give a genuinely relevant flavour today on how much is likely to be in the Redfern  
23 schedule. But what I could do is, in writing, be bound by a direction or a volunteered  
24 undertaking to give you that kind of indication, say, if there's a ten week extension,  
25 and the original date was mid-February, that takes it into sort of late April, at a date of  
26 your discretion, say, the end of February or the end of March. I can't really do it now.

1 I can't really say to you, "Well, now", because the team hasn't yet been, for the reasons  
2 we've set out --

3 THE CHAIRMAN: Yes, what would be helpful is if you could write to the tribunal by  
4 the end of February, just saying where we are. It doesn't need to be War and Peace,  
5 just a couple of pages so we just keep an eye on it and we know where we are.

6 Is there going to be another CMC, or do we say we're not going to pencil in another  
7 CMC, and the next stage is going to be the PTR? Because it does seem a long way  
8 away, and I can see other issues arising.

9 My inclination is to say we're not going to pencil in a CMC now, but there may well  
10 have to be a further CMC depending on the various moving parts that we've identified  
11 today.

12 MR HARRIS: That's my inclination, too, sir. We don't pencil it in, but we're all alert to  
13 the fact that it's a live possibility.

14 THE CHAIRMAN: Yes, because I know every CMC, you know, costs more than  
15 a guinea, doesn't it?

16 MR HARRIS: Yes, I'm afraid so.

17 THE CHAIRMAN: Mr MacLean, what do you say about another CMC?

18 Submissions by MR MACLEAN

19 MR MACLEAN: The CMC is -- one can foresee there will need to be one, but I don't  
20 see we can gaze into the crystal ball now and pencil in a date.

21 THE CHAIRMAN: No, I agree.

22 MR MACLEAN: I would imagine that the PTR, if there are really live issues that the  
23 parties need to have the tribunal's assistance on, is going to need to be before  
24 February 2028, which is when the PTR's pencilled in for.

25 THE CHAIRMAN: Did we actually put in a date for the PTR?

26 MR MACLEAN: Yes, I think so. You're absolutely right, sir, that we will be -- I think

1 on both sides, we're cognizant of the fact if there are real issues, there may need to  
2 be another CMC, but we just simply can't pencil in the date at this stage. But we'll  
3 keep that under review.

4 As far as Redfern is concerned, we think it's very unlikely that we'll be, you know,  
5 populating a very detailed Redfern schedule in terms of disclosure coming from that  
6 side.

7 THE CHAIRMAN: But this case is more complicated than the Whistl case, because  
8 the Whistl case, you could say, "Well, Whistl, you would have come in, you wouldn't  
9 have survived very long and you've lost money, and in the long run you've got no loss".  
10 What the CR may say, "Well, we're only representing people for a specific period.  
11 Whistl might have come in, prices would have gone lower. Whether they would have  
12 had a car crash and burnt out and disappeared after five years, okay, that's one thing.  
13 But in the meantime, we'd have had the benefit of lower prices". So I do see this as  
14 a bit more complicated than the Whistl case.

15 MR MACLEAN: Sir, you're right. Certainly on certain levels it is. I see that.

16 THE CHAIRMAN: Yes. No, because there was the suggestion that, you know, you've  
17 been through all this once before and that hence you don't really have a huge amount  
18 to do and they can't understand how you get to 21.6 million.

19 But I can see how you get there, though hopefully at the next time around we'll have  
20 a budget so we can all see precisely how it works there.

21 MR MACLEAN: I'll have a word with my clerks.

22 THE CHAIRMAN: Yes, no, but seriously, this is a serious point here, that this is not  
23 just.

24 MR MACLEAN: I see that. The ATE point is well in mind.

25 THE CHAIRMAN: Yes.

26 MR MACLEAN: Absolutely.

1 THE CHAIRMAN: The tribunal's always very conscious to try and keep the costs as  
2 low as reasonably possible. Some people may look at the figures here and say, "Well,  
3 how can you justify that?" for what some people may say is a relatively simple case.  
4 I don't see this case as particularly simple. I'm not saying it's the most complicated  
5 case there is; it clearly isn't. But the figures that I'm seeing from both sides are not  
6 figures that -- let me put it this way, they don't surprise me at this stage.

7 MR MACLEAN: Well, that's good.

8 THE CHAIRMAN: I don't know if it is good, but I'm just saying that that's what we see.  
9 So whilst you may hear different things in different cases about the costs, I can see  
10 that this case isn't one where I feel that we should be cutting everything to the bone,  
11 because there's quite a few things to work out, let's put it that way.

12 MR MACLEAN: Very well. I'm grateful for that.

13 THE CHAIRMAN: Okay. Thanks very much. Anything else anyone wants to say?

14 MR HARRIS: No, sir.

15 THE CHAIRMAN: Okay, let me just have --

16 MR RAYMENT: Oh, I'm sorry. I'm so sorry.

17 THE CHAIRMAN: Oh, yes.

18 MR RAYMENT: I just have one minor housekeeping matter to raise. It's just whether  
19 to inquire of you whether you've formed any sort of view about whether you plan to  
20 release your ruling subject to an embargo, like you did on the last occasion, if you  
21 recall.

22 I just wanted to draw to your attention the fact that it was released under an embargo,  
23 only to authorised legal representatives created some issues in terms of being able to  
24 progress the order, because we couldn't consult with the class representative and we  
25 couldn't consult with our experts. I just wanted to raise that for your consideration.

26 THE CHAIRMAN: Okay, so what you want to be able to do is to get the draft ruling

1 and show it to your experts and obviously the CR.

2 Mr MacLean, have you got any difficulty with that?

3 MR MACLEAN: Not at all.

4 MR RAYMENT: I think we're equally affected by it.

5 THE CHAIRMAN: And that as regards Royal Mail, then they should have the right to

6 share the draft ruling with the in-house legal department or whoever's the responsible

7 person in-house --

8 MR MACLEAN: And our experts --

9 THE CHAIRMAN: And your experts, of course.

10 MR RAYMENT: I don't think we have any -- we don't have any objections to that.

11 THE CHAIRMAN: Yes, that's absolutely fine. So it's clear: legal team, plus CR, plus

12 experts on your side; legal team, plus head of external -- client's side -- plus experts.

13 Is that okay?

14 MR RAYMENT: I'm grateful.

15 THE CHAIRMAN: Okay. We did finish on time. I was hoping to finish by 4.30.

16 As regards the timing of the draft ruling, a lot depends on when we get the ruling back

17 from the transcribers because there's sometimes a delay, and at this time of year,

18 I don't know when we're going to get it back. But what I would hope is that you'll get

19 the draft ruling the week -- well, after Christmas, but before the new year -- and a date

20 to give any comments at the very beginning of January. So I think that way, we'll give

21 everyone the opportunity to look at it and come up with all the spelling mistakes and

22 that sort of stuff. So the ruling won't be available to the public until sometime in the

23 first week of January. (Pause)

24 MR RAYMENT: Sir, on that basis, are you envisaging that the order would come after

25 the --

26 THE CHAIRMAN: Well, it's sometimes helpful to have the order to finalise the ruling,

1 but I think that what you should do is it should be fairly clear what the order should be.  
2 So I would like, if we can, to have the draft order before Christmas so that when  
3 I finalised the ruling, I'll have that in front of me. But it may be that all you can do is  
4 agree up until a certain point, say these are outstanding, and that you then get the  
5 ruling roughly at the same -- yes, by the time I issue the draft ruling, it would be helpful  
6 to me to have the draft order. So if you're looking for something on or about --

7 MR RAYMENT: It's just whatever's the most helpful.

8 THE CHAIRMAN: Yes, for me. I don't know what your Christmas plans are and what  
9 the dates are.

10 MR RAYMENT: Sir, I think the fact that we can consult our clients and the experts will  
11 mean that we're in a position to give you an order before your ruling's handed down.  
12 I think that's the key point.

13 THE CHAIRMAN: Yes, but I'm likely, when it comes to about 27 December, to have  
14 had the transcript back and everything, and it's on that day that, hopefully, the ruling  
15 could be finalised and then sent to you. So is it realistic to think that you could get the  
16 draft order by the 23rd? I don't know how realistic that is on your side, in which case  
17 I postpone it until the 27th and then say I need the draft order by the 27th. (Pause)

18 MR RAYMENT: We think it's feasible, the 23rd. So we will certainly (overspeaking) --

19 THE CHAIRMAN: Yes, so if we can get a draft -- by the best endeavours to get it by  
20 the 23rd, even though appreciating you may not be in a position, let's say, to sort of  
21 get to a concrete landing until you've got the draft ruling on or about the 27th. Okay.

22 MR RAYMENT: I'm grateful.

23 THE CHAIRMAN: Thank you very much.

24 (4.26 pm)

25 (The hearing concluded)

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### Key to punctuation used in transcript

|              |  |
|--------------|--|
| --           | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking  |
| ...          | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.   |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| -            | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?  |